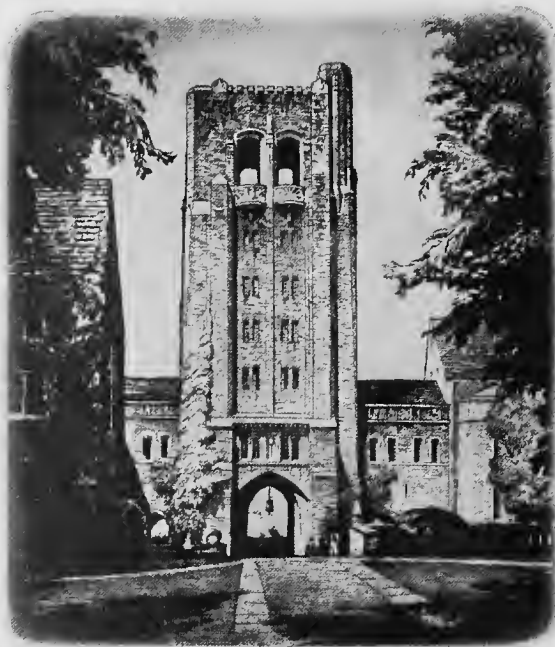




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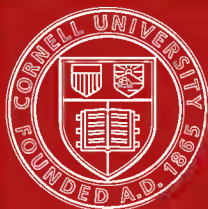


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THE LAW AND PRACTICE
AS TO
RECEIVERS
APPOINTED BY
THE HIGH COURT OF JUSTICE
OR
OUT OF COURT,
WITH A CHAPTER ON SEQUESTRATION.

BY THE LATE
WILLIAM WILLIAMSON KERR, M.A.,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

SEVENTH EDITION

BY
F. C. WATMOUGH, B.A.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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PREFACE

TO THE SEVENTH EDITION.

IN this edition a chapter on Sequestration and Sequestrators has been added.

In the remainder of the work a certain amount of rearrangement between the chapters has been made, and a number of paragraphs have been rewritten, in order to secure greater correspondence of the subject-matter of each chapter with its title. An attempt has also been made to avoid duplication of the same topic, but a certain amount of repetition appears to be inevitable.

A section has been added at the end of Chapters III. to VII. and XIV., dealing with matters peculiar to receivers in debenture-holders' actions, the intention being to afford a short sketch of the practice in such actions, so far as receivers are concerned with it. It is not however intended that these sections should deal exhaustively with these receivers, as this would involve repeating the bulk of the earlier part of the several chapters; only those matters are discussed in the sections in question which are peculiarly appropriate to receivers of the undertakings of companies: on all other points relating to such receivers the earlier part of the several chapters should be consulted. The remaining chapters do not admit of similar treatment, as practically the whole of them apply to receivers in debenture holders' actions equally with other receivers.

F. W.

21, OLD SQUARE, LINCOLN'S INN,
July, 1920.

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A TREATISE
ON THE LAW AND PRACTICE
AS TO
RECEIVERS
APPOINTED BY
THE HIGH COURT OF JUSTICE
OR
OUT OF COURT
WITH A CHAPTER ON SEQUESTRATION.

CHAPTER I.

PRINCIPLES ON WHICH A RECEIVER IS APPOINTED BY
THE HIGH COURT OF JUSTICE.

THE jurisdiction of the Court of Chancery to appoint a receiver was assumed for the advancement of justice, and was founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction. Where the remedy afforded by the courts of ordinary jurisdiction was inadequate for the purposes of justice, the Court of Chancery would *ex debito justitiæ*, on a proper case being made out, appoint a receiver (a).

(a) *Hopkins v. Worcester, &c.* Giffard, L.J. See *Cupit v. Jackson*, 13 Pri. 734.
L. R. 6 Eq. 447, *per*

Chap. I. The Courts of Common Law had not, under the former procedure, jurisdiction to appoint a receiver. But by the Judicature Act, 1873, s. 16, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice; and by s. 25, sub-s. 8 of that Act it is declared, that a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient that such order should be made; and that any such order may be made either unconditionally, or upon such terms and conditions as the court shall think fit.

A receiver may now be appointed in any division of the High Court. In one sense the jurisdiction to appoint a receiver is enlarged (*b*); certain inconvenient rules are relaxed and there is no longer any limit to the jurisdiction to appoint a receiver upon interlocutory application (*c*). But the principles upon which the jurisdiction is exercised are still those upon which the Court of Chancery proceeded (*d*). Thus a receiver may be appointed in any proceedings without the commencement of special proceedings being necessary; it is no longer for instance necessary for a judgment creditor to commence proceedings in the Chancery Division, before obtaining a receiver over an equity of redemption (*e*); but a receiver will not be appointed in cases where the Court of Chancery would have had no jurisdiction to make the appointment after

(*b*) *Anglo-Italian Bank v. champ*, [1894] 1 Q. B. 801; *Davies*, 9 Ch. D. 286, 293.

(*c*) *Gawthorpe v. Gawthorpe* (1878), W. N. 91, *per* Jessel, judgment of Moulton, L.J.; *M.R.*; *Coney v. Bennett*, 29 Ch. D. 993. *Morgan v. Hart*, [1914] 2 K. B. 183.

(*d*) *Holmes v. Millage*, [1893] 1 Q. B. 551; *Harris v. Beau-* (*e*) *Smith v. Cowell*, 6 Q. B. D. 75.

the special proceedings had been instituted (*f*). The Chap. I
 court will not now, any more than it would formerly, appoint a receiver by way of equitable execution, over property the title to which is legal, merely because it affords a more convenient method of obtaining payment (*g*); nor merely because the property is not amenable to legal execution for reasons other than the equitable nature of the debtor's title (*h*); nor will the court appoint a receiver except in aid of existing rights (*i*).

The words "interlocutory order" in the Judicature Act, 1873, s. 25, sub-s. 8; are not confined in their meaning to an order made between writ and final judgment, but mean an order other than an order made by way of final judgment in an action, whether such order be made before judgment or after (*k*). The court cannot properly order discovery on a motion, *e.g.* for a receiver, after judgment, though it may order production of documents necessary for working out the judgment (*l*).

The court has the same power of appointing a receiver at the trial of the action as it has on interlocutory application (*m*).

The jurisdiction of the court relative to the appointment of receivers and the authority to be given them has been further enlarged by the provisions of R. S. C.,

(*f*) *Holmes v. Millage*; *Morgan v. Hart*, *supra*. p. 78.

(*g*) *Morgan v. Hart*, *supra*, and pp. 50, 133.

(*h*) *Edwards & Co. v. Picard*, *supra*.

(*i*) *Philipps v. Jones*, 28 Sol. Jo. 360.

(*k*) *Smith v. Cowell*, 6 Q. B. D.

(*l*) *Korkis v. Andrew Weir & Co.*, [1914] W. N. 99; if accounts have been referred to a Special Referee application should be made to him.

(*m*) *Re Prytherch*, 42 Ch. D. 590.

Chap. I. Ord. 50, r. 3, where it is necessary to preserve property which is in dispute in a pending action (*n*).

Nature of
the office.

A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or the produce of personal estate or other things in question, which it does not seem reasonable to the court that either party should collect or receive, or where a party is incompetent to do so, as in the case of an infant. A receiver can only be properly granted for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons or person entitled thereto (*o*).

The object sought by the appointment of a receiver may be described generally to be to provide for the safety of property, pending the litigation which is to decide the rights of litigant parties (*p*), or during the minority of infants, or to preserve property in danger of being dissipated or destroyed by those to whom it is by law entrusted, or by persons having immediate but partial interests therein (*q*). Independently of the Judicature Act, 1873, when a plaintiff has a right to be paid out of a particular fund, the court will appoint a receiver to protect that fund from being dissipated so as to defeat his rights (*r*).

Appoint-
ment a
matter of
discretion.

The appointment of a receiver is a matter resting in

(*n*) *Per* Farwell, L.J., in *Leney & Sons v. Callingham*, [1908] 1 K. B. 79; and see *Chaplin v. Barnett*, 28 Times Rep. 256.

(*o*) *Evans v. Coventry*, 3 Drew. 80; see, too, *Wright v. Vernon*, ib. 121.

(*p*) *Tullett v. Armstrong*, 1 Keen, 428; *Owen v. Homan*, 4 H. L. C. 1032.

(*q*) Mitf. Pl. 133.

(*r*) *Cummins v. Perkins*, [1899] 1 Ch. 16, 19, *per* Lindley, M.R.

the sound discretion of the court (s). In exercising its Chap. I.
discretion the court proceeds with caution, and is governed by a view of all the circumstances of the case. No positive or unvarying rule can be laid down as to whether the court will or will not interfere by this kind of *interim* protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is the common interest of all parties that the court should prevent a scramble. Such is the case where the receiver of property of a deceased person is appointed pending a litigation as to the right to probate or administration. No one is in the actual enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case is necessarily involved in further questions. The court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant, before the title of the plaintiff has been judicially established, it exercises a discretion to be governed by all the circumstances of the case. Where the evidence on which the court is to act is very clear

(s) *Greville v. Fleming*, 2 Ch. D. 590; *Re Henry Pound*, J. & L. 339; *Re Prytherch*, 42 *Son, & Hutchins*, ib. 419.

Chap. I. in favour of the plaintiff, there the risk of eventual injury to the defendant is very small, and the court does not hesitate to interfere. Where there is more of doubt, there is of course more of difficulty. The question is one of degree, as to which, therefore, it is impossible to lay down any precise or unvarying rule (t).

The duty of the court upon a motion for a receiver, is merely to protect the property for the benefit of the person or persons to whom the court, when it has all the materials necessary for a determination, shall think it properly belongs (u). On a motion for a receiver the court will not prejudice the action (v), or say what view it will take at the trial (w). In dealing with the application the court is bound to express its opinion only so far as it is necessary to show the grounds on which the interlocutory motion is disposed of. It is the duty of the court to confine itself strictly to the point which it is called upon to decide, and not to go into the merits of the case (x). Indeed, the court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim (y.) Nor will the appointment be made where it might affect existing rights: a receiver will not, for instance, be appointed merely to prevent an executor exercising his right of retainer (z).

(t) *Owen v. Homan*, 4 H. L. C. 1032, *per* Lord Cranworth. Co., 11 Ha. 264.

(u) *Blakeney v. Dufaur*, 15 Beav. 42. (x) *Skinnners' Company v. Irish Society*, 1 My. & Cr. 164.

(v) *Huguenin v. Basley*, 13 Ves. 107. (y) *Greville v. Fleming*, 2 J. & L. 335; see *Marshall v. Charteris*, [1920] 1 Ch. 520.

(w) *Fripp v. Chard Railway* (z) *Re Wells*, 45 Ch. D. 569.

In determining whether it shall appoint a receiver, the Chap. I.
 court deals with the case as it appears upon the pleadings and evidence, and stands on the record (a). If the court is satisfied upon the materials it has before it that the party who makes the application has established a good *prima facie* title, and that the property the subject-matter of the proceedings will be in danger, if left until the trial in the possession or under the control (b) of the party against whom the receiver is asked for (c), or, at least, that there is reason to apprehend that the party who makes the application will be in a worse situation if the appointment of a receiver be delayed (d), the appointment of a receiver is almost a matter of course (e). If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed, unless there be some other equity in the case to support the application (f). The mere allegation of danger to the property is not sufficient, if the court is satisfied that no loss need be apprehended (g). If, however, it be the true and necessary result of the pleadings, as they stand, that the property is in danger, or that loss may be apprehended, there is a case for a receiver (h).

(a) *Silver v. Bishop of Norwich*, 3 Sw. 116, n.; *Skinners' Company v. Irish Society*, 1 My. & Cr. 164.

(b) *Cummins v. Perkins*, [1899] 1 Ch. 16; *Leney & Sons, Ltd. v. Callingham*, [1908] 1 K. B. 79.

(c) *Evans v. Coventry*, 5 D. M. & G. 918.

(d) *Aberdeen v. Chitty*, 3 Y. & C. 382; *Thomas v. Davies*, 11 Beav. 29.

(e) See *Middleton v. Dodswell*,

13 Ves. 266; *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272; *Real and Personal Advance Co. v. Macarthy*, 27 W. R. 706.

(f) *Whitworth v. Whyddon*, 2 Mac. & G. 55; *Wright v. Vernon*, 3 Drew. 121; *Micklethwaite v. Micklethwaite*, 1 D. & J. 530.

(g) *Whitworth v. Whyddon*, 2 Mac. & G. 55.

(h) *Evans v. Coventry*, 5 D. M. & G. 917.

Chap. I. It is not, however, necessary, in order to entitle a party to the appointment of a receiver, that the property in question should appear to be in danger, unless the appointment be made. It is enough that a good equitable title be made to appear, if the ordinary remedy would not fulfil the requirements of justice (*i*). A receiver, accordingly, may, on a proper case being made out, be appointed to raise the arrears of an annuity (*j*), or a rent-charge (*k*); so, also, an equitable mortgagee has a right to a receiver appointed if his principal is payable or the payment of interest on his security be in arrear (*l*); so, also, if a person takes the conveyance of a legal estate, subject to equitable interests, he must satisfy these equitable interests, or submit to the appointment of a receiver (*m*).

Conduct of party who makes the application looked to. The court, on the application for a receiver, always looks to the conduct of the party who makes the application, and will refuse to interfere unless his conduct has been free from blame (*n*). Parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the court for a receiver (*o*).

Pleadings, parties, &c. The record should be in such a state as will enable the judge to determine who is to take out of court the fund which the appointment of the receiver shall have brought

(*i*) See *Cupit v. Jackson*, 13 Pri. 734; *White v. Smale*, 22 Beav. 73; *White v. James*, 26 Beav. 191.

(*j*) *Ib. Beamish v. Austen*, Ir. R. 9 Eq. 361; and see *infra*, p. 36.

(*k*) *White v. Smale*, 22 Beav. 73.

(*l*) *Re Crompton & Co., Ltd.*,

[1914] 1 Ch. 954; and see p. 37.

(*m*) *Pritchard v. Fleetwood*, 1 Mer. 54.

(*n*) See *Baxter v. West*, 28 L. J. Ch. 169. Comp. *Wood v. Hitchings*, 2 Beav. 297.

(*o*) *Gray v. Chaplin*, 2 Russ. 147; *Skinners' Company v. Irish Society*, 1 My. & Cr. 162.

into court (*p*). But if the court sees that upon the record Chap. I. there is a case for the appointment of a receiver, it is no sufficient answer that the record is not perfect as to particulars, and is not in the shape in which the court may find it necessary that it should be placed in order to administer complete justice. If the objection is a formal one, and such as may be removed by amendment, it will not stay its hand on account of any such objection. Objections on the ground of misjoinder, multifariousness, or want of parties, were never an answer on the application for a receiver, if a case for the appointment of a receiver was shown (*q*).

If the subject of the action in respect of which a receiver is sought is a matter of public interest, the Attorney-General should be made a party (*r*).

A receiver cannot be brought before the court except in cases of personal misconduct, nor, except in such a case, can costs be asked for against him (*s*).

In the Court of Chancery, when the original bill had been answered, the pendency of a plea to the amended bill did not prevent a motion for a receiver (*t*).

Further, where certain allegations in the bill and affidavits were relevant to the relief asked, that court would not on motion allow exceptions to be taken to them (*u*). Where, for instance, a bill for a receiver alleged that the executor was of bad character and drunken habits,

(*p*) *Gray v. Chaplin*, 2 Russ. 147.

(*q*) *Evans v. Coventry*, 5 D. M. & G. 918; *Hamp v. Robinson*, 3 D. J. & S. 109; *Re Johnson*, L. R. 1 Ch. 325.

(*r*) *Gray v. Chaplin*, 2 Russ. 147; *Skinners' Company v. Irish*

Society, 1 My. & Cr. 162.

(*s*) *General Share Co. v. Wetley Brick Co.*, 20 Ch. D. 260, 267; 30 W. R. 445, *per* Jessel, M.R.

(*t*) *Thompson v. Selby*, 12 Sim. 100.

(*u*) *Everett v. Prythergh*, 12 Sim. 365.

Chap. I. the Court of Chancery would not, on motion for a receiver, allow exceptions for scandal and impertinence (v).

If a receiver is claimed generally, the court may grant the claim as far as is proper, or in a limited form (w).

Where a receiver has been appointed generally in an action, it is unnecessary, when the action comes on upon further consideration, to insert in the minutes a direction to continue the receiver (x). So, also, a receiver appointed on an interlocutory application before judgment need not be continued by the judgment (y), unless the appointment was in the first instance an *interim* appointment only (z). If the judgment continues a receiver who has been appointed until judgment or further order, this is practically a new appointment, and further security must be given (a).

Order for
receiver
operates as
an injunction.

The appointment of a receiver operates as an injunction (b). An order for an injunction is always in a sense included in an order for a receiver, and receipt of sums over which a receiver has been appointed by any other person with notice of the order is a contempt, although the payment is made by a person not accountable for a breach of the order, *e.g.* the Crown (c). It is not necessary, as a rule, if a receiver be appointed, to go on and grant

(v) *Everett v. Prythergh*, 12 Sim. 365.

(w) *Major v. Major*, 8 Jur. 797.

(x) *Re Underwood*, 37 W. R. 428.

(y) *Davies v. Vale of Evesham Preserves* (1895), W. N. 105; 73 L. T. 150; 43 W. R. 646.

(z) *Cruse v. Smith*, 24 Sol. J. 121.

(a) *Brinsley v. Lynton Hotel Co.* (1895), W. N. 53.

(b) *Tyrrell v. Painton*, [1895] 1 Q. B. p. 206, *per* Lindley, L.J.; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157; *Ex parte Peak Hill Goldfield*, [1909] 1 K. B. 430.

(c) *Eastern Trust Co. v. McKenzie, Mann & Co.*, [1915] A. C. 750.

an injunction in terms; but in cases where persons in a fiduciary character have misconducted themselves, the court will often grant an injunction as well as a receiver, not because an injunction is necessary to prevent a party from receiving when a receiver is once appointed, but for the purpose of marking its sense of the conduct of the parties who have misconducted themselves (*d*).

The court may abstain from appointing a receiver on the submission of the defendant to an order to pay moneys into court (*e*) or otherwise (*f*), to deal with moneys as the court shall direct (*g*), or to pay an occupation rent (*h*).

Receiver
not ap-
pointed on
defendant
sub-
mitting to
order.

The practice on the appointment, the effect of the order and other topics are dealt with at length in subsequent chapters. The procedure of the King's Bench Division in relation to the appointment of a receiver is, as far as possible, analogous to the procedure in like circumstances of the Chancery Division (*i*).

The High Court has jurisdiction to appoint a receiver in a proper case, although another court has already appointed a receiver over the same property in a concurrent action (*j*), and will stay further proceedings in such concurrent action if in the circumstances of the case they are vexatious (*k*). Thus, an equitable mortgagee

(*d*) *Evans v. Coventry*, 3 Drew. 82. As to practice in cases of equitable execution, see p. 159.

(*e*) *Curling v. Lord Townshend*, 19 Ves. 633; *Palmer v. Vaughan*, 3 Sw. 173.

(*f*) *Pritchard v. Fleetwood*, 1 Mer. 54.

(*g*) *Talbot v. Hope Scott*, 4 K. & J. 141.

(*h*) *Porter v. Lopes*, 7 Ch. D. 358; *Real and Personal Advance Co. v. Macarthy*, 27 W. R. 707.

(*i*) *Walmsley v. Mundy*, 13 Q. B. D. 807. As to appointment in Divorce, see p. 182.

(*j*) *Nothard v. Proctor*, 1 Ch. D. 4.

(*k*) *Re Connolly Bros., Ltd.*, [1911] 1 Ch. D. 731.

Chap. I. had commenced an action in the Palatine Court and obtained a receiver therein *ex parte*, after a writ had, to his knowledge, been issued in a debenture holders' action in the Chancery Division relative to the same, amongst other, property; Parker, J., who had appointed a receiver in the Chancery action without knowledge of the order made in the Palatine action, restrained the plaintiff in the latter action from further proceeding therewith, on the ground that all matters in dispute could be adjusted in the Chancery action, whereas some only of them could be dealt with in the Palatine action, and that the conduct of the plaintiff in the latter action was in the circumstances vexatious: this decision was affirmed by the Court of Appeal (l).

Costs of
motion.

The court, at its discretion, may either deal with the costs of a motion for a receiver at the time of the application (m), or order the costs of the application to be costs in the action (n).

The costs of a motion for a receiver are sometimes reserved until the trial (o), even although the application is refused (p). Where no direction as to costs is given the party making a successful motion is entitled to his costs as costs in the action, but the party opposing is not; where the motion fails the party moving is not, but the party opposing is, entitled to his costs as costs in the

(l) *Re Connolly Bros., Ltd.*, *supra*; the proper course where such an order has been made is to apply in the concurrent action for the discharge of the receiver appointed therein.

(m) *Goodman v. Whitcomb*, 1 J. & W. 593; *Wilson v. Wilson*, 2 Keen, 249; *Wood v. Hitchings*,

4 Jur. 858.

(n) *Hewett v. Murray*, 54 L. J. Ch. 572; *Tillett v. Nixon*, 25 Ch. D. 238.

(o) *Chaplin v. Young*, 6 L. T. N. S. 97.

(p) *Baxter v. West*, 28 L. J. Ch. 169; *Coope v. Creswell*, 12 W. R. 299.

action ; where the motion is not opposed the costs of both parties are costs in the action (q). Chap. I.

The respondent to an abandoned motion is entitled to his costs thereof, although he has given no notice of his claim to such costs (r).

Where at the trial an application for a receiver was unsuccessful but the plaintiff was successful on another claim, he was ordered to pay the costs so far as increased by the application for a receiver (s).

Where a plaintiff proceeds by writ instead of originating summons in a case where he might have proceeded by originating summons, he will be allowed such costs only as he would have been entitled to if he had proceeded by originating summons (t).

An order refusing to appoint a receiver is a matter of Appeal. practice and procedure, from which an appeal will not lie without leave (u) ; but by section 1 (b) (2) of the Judicature Act, 1894, an appeal lies without leave from an order appointing a receiver.

(q) See *Corcoran v. Witt*, L. R. 13 Eq. 53 ; comp. *Grimston v. Timms*, 18 W. R. 747, 781. And see *Morgan and Wurzburg*, pp. 47-55 ; *Annual Practice*, n. to Ord. 65, r. 23.

(r) *Hinde v. Power*, [1913] W. N. 184.

(s) *Re New York Taxicab Co.*, [1913] 1 Ch. 1.

(t) *Barr v. Harding*, 36 W. R. 216 ; *Re Francke* (1888), W. N. 69 ; 57 L. J. Ch. 437.

(u) *Hood Barrs v. Cathcart*, 11 Times Rep. 262.

CHAPTER II.

IN WHAT CASES A RECEIVER WILL BE APPOINTED.

SECTION 1.—IN THE CASE OF INFANTS.

Chap. II.
Sect. 1.
Receiver
of infant's
estate.

THE court will, upon a proper case being made out, protect the estate of an infant by appointing a receiver (*a*), even against his father (*b*); though now in most cases the estate of the infant may be protected by the appointment of trustees under section 42 of the Conveyancing Act, 1881, which applies to land to which the infant becomes entitled by descent (*c*).

Where infants are concerned, the court considers chiefly what would be most beneficial to their interests (*d*). If an infant has, or becomes possessed of, an estate, a receiver will be appointed if it appear that his father is insolvent or of bad character, or that there is danger of the rents being lost (*e*). In a case where the mother of infants was dead, and the father was a man of irregular habits who had married his servant, the minors being

(*a*) *Butler v. Freeman*, Amb. 337. See also s. 60, Settled Land Act, 1882.

(*b*) *Ramsden v. Fairthrop*, 1 N. R. 389; see, too, *Whitelaw v. Sandys*, 12 Ir. Eq. 393.

(*c*) *Re Cowley*, [1901] 1 Ch. 38; *Re Glover*, [1899] 1 Ir. R. 15 Ves. 449 n.

(*d*) *Butler v. Freeman*, Amb. 303.

(*e*) *Kiffin v. Kiffin*, cited 1 P. W. 704; *Ex parte Mountfort*,

entitled to real estate in right of their mother, a receiver was appointed (*f*). Chap. II.
Sect. 1.

It has been held that if there is no testamentary guardian appointed by the testator (*g*), or if the testamentary guardian appointed by the will declines to act (*h*), a receiver will be appointed on a proper case being made out; but in considering these cases it must be remembered that after the father's death the mother, and after her death her nominees, would be guardians, jointly with persons appointed by the father, by virtue of the Guardianship of Infants Act, 1886, with all the powers of guardians under 12 Car. 2, c. 24. The appointment, however, of a testamentary guardian of an infant by his father, under stat. 12 Car. 2, c. 24, does not constitute any objection to the appointment of a receiver of the estate of the infant. The exercise by the father of an infant of the power given by that Act to appoint a testamentary guardian, to whom the statute gives the custody of the profits of the infant's lands, and the management of his personal estate, does not affect the right of the court to appoint a receiver, the guardian having no estate, and the extent of his powers being uncertain (*i*). Guardians appointed by will under the statute have no more power than guardians in socage, and are but trustees. If it be made to appear that the estate of an infant is likely to suffer by the conduct of his guardian, the court will interpose and appoint a receiver, upon the principles upon which it interposes in the case

(*f*) *Re Cormicks*, 2 Ir. Eq. 111.
264.

(*g*) *Hicks v. Hicks*, 3 Atk. 381. In some cases the guardian
274. has been himself appointed

(*h*) *Bridges v. Hales*, Mose. receiver. Seton, 7th ed., p. 951

Chap. II. of trustees and executors (*k*). In a case, accordingly,
 Sect. 1. where the mother of infant children, who had been
 appointed by her husband executrix and guardian of the
 children, married a man in necessitous circumstances, a
 receiver was appointed (*l*).

SECTION 2.—IN THE CASE OF EXECUTORS AND TRUSTEES.

Sect. 2. The court will, upon a proper case being made out,
 Receiver not appointed on slight grounds. dispossess an executor or trustee of the trust estate by
 appointing a receiver, but it will not do so upon slight
 grounds. It is for the testator or creator of the trust,
 and not for the court, to say in whom the trust for the
 administration of the property shall be reposed. Though
 an action be brought by a person having an interest in
 the estate, it does not follow that the trust created by the
 testator or settlor is to be set aside (*m*). A strong case
 must be made out to induce the court to dispossess a
 trustee or executor who is willing to act (*n*). If there
 is no danger to property, and no fact is in evidence to
 show the necessity of interfering by appointing a
 receiver, the court will not appoint one (*o*). Nor will
 the court, at the instance of one of several parties
 interested in an estate, displace a competent trustee, or
 take the possession from him, unless he has wilfully or
 ignorantly permitted the property to be placed in a state
 of insecurity, which due care or conduct would have

(*k*) *Duke of Beaufort v. Berty*,
 1 P. W. 704; *infra*, p. 19; see,
 as to order for receiver and in-
 junction, *Brooke v. Cooke*, Seton,
 6th ed., p. 731.

(*l*) *Dillon v. Lord Mount-*
cashell, 4 Bro. P. C. 306.

(*m*) *Middleton v. Dodswell*, 13
 Ves. 268.

(*n*) *Smith v. Smith*, 2 Y. & C.
 361 · *Bainbridge v. Blair*, 4 L. J.
 Ch. N. S. 207.

(*o*) *Whitworth v. Whyddon*, 2
 Mac. & G. 52.

prevented. It is not enough that the estate may have depreciated in value, and that the incumbrances thereon may have been increasing, if the management of the trustees does not appear to have been improper (p). Chap. II.
Sect. 2.

It is no sufficient cause for the appointment of a receiver that one of several trustees has disclaimed (q); for the disclaimer of one of several trustees does not in law affect the estate of the others, but has the effect of vesting it in them exclusively (r); and the testator or creator of the trust must be presumed to know what the legal consequences of the death or disclaimer of some of them must be. Where, accordingly, there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver without the consent of those who remain (s).

Nor is it a sufficient cause for the appointment of a receiver that the trustees or executors are poor or in mean circumstances (t), or that being trustees for sale, they have let the purchaser into possession before they received the purchase-moneys, for the court will not necessarily infer this to be misconduct (u).

Nor is it a sufficient cause for the appointment of a receiver that one of several trustees is inactive (x), or has gone abroad (y).

Where an association was carried on as a Friendly Society, but not subject to the restrictions imposed by

(p) *Barkley v. Lord Reay*, 2 Ha. 308.

(q) *Browell v. Reed*, 1 Ha. 434; but see *Tait v. Jenkins*, 1 Y. & C. C. C. 492.

(r) *Small v. Marwood*, 9 B. & C. 300; *Townson v. Tickell*, 3 B. & Ald. 31.

K.R.

(s) *Browell v. Reed*, 1 Ha. 434.

(t) *Anon.*, 12 Ves. 4; *Howard v. Papera*, 1 Madd. 142.

(u) *Browell v. Reed*, 1 Ha. 434.

(x) *Ib.*

(y) *Ib. per Wigram*, V.-C.; and see ss. 10 and 25, Trustee Act, 1893.

Chap. II. the Friendly Societies' Acts, and the funds were partly
 Sect. 2. devoted to objects not contemplated by the subscribers
 and were insufficient to meet obligations, it was held that
 the relation of trustee and beneficiary existed and a
 receiver was appointed (z).

Miscon- If any misconduct, waste, or improper disposition of
 duct, &c., the assets can be shown (a), or if it appear that the trust
 a ground property has been improperly managed, or is in danger
 for a receiver. of being lost (b)—*e.g.*, owing to the insolvency of the
 executor (c)—or if it can be satisfactorily established
 that parties in a fiduciary position have been guilty of
 a breach of duty, there is a sufficient foundation for the
 appointment of a receiver (d).

The appointment of a receiver pending a grant of
 probate or letters of administration is dealt with in the
 succeeding section (e). As a grant will not be with-
 held, or probate impounded, on the ground of jeopardy,
 the proper course is to apply in the Chancery Division
 for a receiver in such a case (f).

Where a portion of a trust fund has been lost, that loss
 is *prima facie* evidence of a breach of duty on the part of
 the trustees, sufficient to authorise the interference of the

(z) *Re One and All Sickness, &c., Association*, Times News-
 paper, 12th, 18th Dec. 1908.

(a) *Anon.*, 12 Ves. 4, *per* Sir
 W. Grant; see, too, *Oldfield v.*
Cobbett, 4 L. J. Ch. N. S. 272.

(b) *Middleton v. Dodswell*, 13
 Ves. 266, 276; *Colebourne v.*
Colebourne, 1 Ch. D. 690.

(c) *Gawthorpe v. Gawthorpe*
 (1878), W. N. 91; *Re H.'s Estate*,
H. v. H., 1 Ch. D. 276.

(d) *Evans v. Coventry*, 5 D. M.
 & G. 918; *Baylies v. Baylies*, 1
 Coll. 537; *Brenan v. Preston*, 2
 D. M. & G. 839; *Bainbrigge v.*
Blair, 3 Beav. 421; *Brooker v.*
Brooker, 3 Sm. & G. 475; *Not-*
hard v. Proctor, 1 Ch. D. 4;
Hamilton v. Girdlestone (1876),
 W. N. 202.

(e) *Post*, p. 25.

(f) *In the goods of Moxley*,
 [1916] 2 Ir. R. 145

court by the appointment of a receiver (g). So, also, it has been held to be a good ground for the appointment of a receiver that an executor or trustee has omitted to raise a certain sum as, according to the will of his testator, he should have done for the maintenance and education of infant legatees (h). "To authorise the court," said Alderson, B. (i), "to appoint a receiver, it is enough to say that the executor has not done what he could to get in the personal estate of the testator; that he has left a considerable portion of it outstanding on improper securities; and that he has not raised a certain sum, as according to the testator's will he should have done, in order that the parties might know what they had to look to" (k). So, also, a receiver will be appointed if it appear that the trustee have an undue leaning or bias towards one of the contending parties (l). Again, where, in consequence of disputes among the trustees, the payment of rents had been permitted to fall into arrear, a receiver was appointed at the instance of the person entitled to the rents for life (m). "A receiver," said Lord Langdale (n), 'must be appointed in order to secure to her the recovery of the arrears of rents and the punctual payment of the accruing rents.'

In *Sheppard v. Oxenford* (o), where a man, who had accepted and held moneys for particular persons upon certain trusts, afterwards denied the legality of the trusts

(g) *Evans v. Coventry*, 5 D. M. & G. 918.

(h) *Richards v. Perkins*, 3 Y. & C. 307.

(i) *Ib.*

(k) See *Hart v. Tulk*, 6 Ha. 611.

(l) *Earl Talbot v. Hope Scott*, 4 K. & J. 139.

(m) *Wilson v. Wilson*, 2 Keen, 249.

(n) *Ib.* 252.

(o) 1 K. & J. 492.

Chap. II. on which he held the moneys, the court appointed a
Sect. 2. receiver.

A creditor in an administration action cannot, unless a case of waste of assets be shown or some other special case be made out, have a receiver appointed merely because the administrator will not admit assets, or has been paying debts and preferring creditors when the estate was insolvent (*p*). Nor will the court interfere with an executor's legal right of retainer by the appointment of a receiver, in cases where it is not shown that the assets are being wasted (*q*). The executor's right of retainer remains whether the estate is insolvent or not. It is only in cases of improper conduct or danger to the assets reasonably proved that the court will interfere by appointing a receiver (*r*).

Bank-
ruptcy,
&c., of
trustee,
when a
ground for
a receiver.

If a sole executor or trustee becomes bankrupt, there is a case for the appointment of a receiver (*s*). But if a testator has selected an insolvent debtor as his executor, with full knowledge of his insolvency, the court will not, on the bare fact of the insolvency alone, interfere by appointing a receiver (*t*). The practice, however, of not

(*p*) *Phillips v. Jones*, 28 Sol. J. 360; *Re Harris*, 35 W. R. 710; 56 L. J. Ch. 754. The dictum of Jessel, M.R., to the contrary in *Re Radcliffe, European Assurance Society v. Radcliffe*, 7 Ch. D. 733, cannot be regarded as law; *Re Wells*, 45 Ch. D. 569, 574.

(*q*) *Re Wells*, 45 Ch. D. 569, approved *Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. p. 173.

(*r*) *Baird v. Walker*, 35 Sol. J. 56; 90 L. T. 56.

(*s*) *Re Johnson*, L. R. 1 Ch.

325; *Re Hopkins*, 19 Ch. D. 61. Where the trustee in bankruptcy of an executor possesses himself of effects which are vested in the executor as executor only, the court will, if it considers it expedient, appoint a receiver instead of directing the return of the effects to the executor (see *Williams on Executors*, 10th ed., p. 476).

(*t*) *Gladdon v. Stoneman*, 1 Madd. 143 n.; *Stainton v. Carron Co.*, 18 Beav. 146, 161.

appointing a receiver where a testator has selected as his executor an insolvent debtor, with knowledge of his insolvency, has not gone so far as to permit a person, against whom there is evidence of insolvency, to prevail against creditors claiming to have the property secured for their benefit, when it is not more than sufficient to pay them (u). Nor is it to be inferred from the circumstances of the will having been made some time before the insolvency, and not altered afterwards, that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor (x). In *Smith v. Smith* (y), the fact that the party who had obtained administration of the testator's real and personal estate was an uncertificated bankrupt, and was not appointed to his office by the testator, but had taken out administration to the widow of the testator, was held not a sufficient reason to induce the court to appoint a receiver before answer, where several of the parties interested declined to join in the application.

Although it is not a sufficient cause for the appointment of a receiver that an executor or trustee is poor or in mean circumstances (z), the case is different if an executor or administrator be proved to be of bad character and drunken habits, and in great poverty (a).

Inasmuch as a married woman is now in all respects competent to act as executrix (b), and can sue or be sued without joinder of her husband, the earlier cases in which

(u) *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272. Sim. 368; and see *Dillon v. Lord Mountcashell*, 4 Bro. P. C. 306.

(x) *Langley v. Hawke*, 5 Madd. 46.

(y) 2 Y. & C. 361.

(z) *Supra*, p. 17.

(a) *Everett v. Prythergh*, 12

(b) See Married Women's Property Act, 1882, ss. 18, 24, and Married Women's Property Act, 1907, s. 1.

Poverty, &c., of trustee, when a ground for a receiver.

Chap. II. a receiver was appointed on the sole ground that an
 Sect. 2. executrix was married to a man who was insolvent or out of the jurisdiction (c) must now be considered obsolete ; but if an executrix is under the influence of a fraudulent or possibly even a necessitous husband this would presumably be a factor influencing the court on an application to appoint a receiver on the ground of jeopardy.

Sole executor abroad. Although it is not a sufficient ground for the appointment of a receiver that one of several trustees has gone abroad (d), the case is otherwise if a sole executor resides (e) or is abroad, and the beneficiaries under the will are unable to obtain an account from the person left in control of the property during the executor's absence (f).

Receiver appointed on consent of parties. If all the *cestuis que trust*, or parties beneficially interested in an estate, concur in the application for a receiver, and the trustee consents, the court will make the order (g). So, in a case where it appeared that one trustee had disclaimed, and that all the other parties desired it, and the other trustee consented, the court ordered that there should be a receiver (h). So, also, in a case where there were two executors and trustees, and one had died and the survivor refused to act, the persons beneficially interested were held entitled to the protection of the court by the appointment of a receiver (i). The fact that the deceased trustee advanced money out of his own pocket to an

(c) *Taylor v. Allen*, 2 Atk. 213 ; see *Pemberton v. M'Gill*, 3 W. R. 557. See also *Yetts v. Palmer*, 9 Jur. N. S. 954 ; *Bathe v. Bank of England*, 4 K. & J. 564.

(d) *Supra*, p. 17.

(e) *Westby v. Westby*, 2 Coo. C. C. 210.

(f) *Dickins v. Harris* (1866), W. N. 93 ; 14 L. T. 98.

(g) *Brodie v. Barry*, 3 Mer. 696 ; see *Bartley v. Bartley*, 9 Jur. 224.

(h) *Beaumont v. Beaumont*, cited 3 Mer. 696.

(i) *Palmer v. Wright*, 10 Beav. 237.

annuitant under the will, in expectation of repayment out of the assets, has been considered to be not a sufficient ground for his representatives to resist the appointment of a receiver, on the assets proving deficient (*k*). Chap. II
Sect. 2.

In a case where two out of three trustees chose to act separately, and took securities in their own names, omitting that of the third trustee, a *cestui que trust* was held entitled to a receiver (*l*); and the court will generally grant a receiver, at the instance of the *cestui que trust*, where a single trustee is, or all the trustees are, out of the jurisdiction (*m*). A receiver may also be appointed where the co-trustees cannot act through disagreement among themselves (*n*). So, too, where the trustees had to manage a business and were themselves not qualified to do so, but could not agree in appointing some person as manager, a receiver was appointed (*o*). Other cases in which a receiver will be appointed.

In *Tidd v. Lister* (*p*), there had been four trustees, one of whom was dead and another was abroad, and the third had scarcely interfered in the trust: the business of the trust fell almost exclusively on one trustee, and, that trustee consenting, Sir J. Leach considered that he was justified in appointing a receiver (*q*). Similarly a receiver was granted on the misconduct of one of three executors and devisees in trust, the other two consenting to the order (*r*).

(*k*) *Palmer v. Wright*, 10 Beav. 237.

(*l*) *Swale v. Swale*, 22 Beav. 584.

(*m*) *Noad v. Backhouse*, 2 Y. & C. C. C. 529; *Smith v. Smith*, 10 Ha. App. 71; or new trustees may be appointed under s. 25 of the Trustee Act, 1893.

(*n*) *Bagot v. Bagot*, 10 L. J.

Ch. N. S. 116; *Day v. Croft* (1839), Lewin on Trusts, 12th ed., p. 1263.

(*o*) *Hart v. Denham* (1871), W. N. 2.

(*p*) 5 Madd. 433.

(*q*) 1 Ha. 434, *per* Wigram, V.-C.

(*r*) *Middleton v. Dodswell*, 13 Ves. 268.

Chap. II. A receiver will also be appointed when the property of
 Sect. 2. a debtor has been vested in trustees for the benefit of his creditors, and the appointment is necessary for the protection of the property (s).

Implied trusts.

In the case of misconduct by trustees, the court will appoint a receiver as well where the trust arises by implication as where it is expressed (t). For example, a tenant for life of leaseholds, who is bound to renew, is clothed with the character of a trustee; and if by his threats or acts he were to manifest an intention to suffer the lease to expire, the court would probably appoint a receiver in order to provide a fund for renewal (u). A similar order, for the appointment of a receiver of the rents and profits of an estate for the purpose of accumulating a fund, was made where the tenant for life had fraudulently obtained a sum of stock to which the trustees of the settlement were entitled (x).

In a case where a testator had bequeathed the residue of his real and personal estate to his widow, stating in his will that he had done so "in perfect confidence that she will act up to those wishes which I have communicated to her in the ultimate disposal of my property after my decease," the court, being satisfied on the evidence that the bequest had been made on the faith of a promise made by her that she would dispose of the property in favour of the plaintiffs, the natural children of the testator, and that an implied trust was accordingly raised in their favour, granted a receiver of the rents of the real estates, and of the personal estate, on the death of the

(s) *Waterlow v. Sharp* (1867),
 W. N. 64.

(t) See *Re One and All Sickness Association*, ante, p. 18.

(u) See *Bennett v. Colley*, 2
 M. & K. 225, at p. 233.

(x) *Woodyatt v. Gresley*, 8
 Sim. 180.

widow, against the testator's heir-at-law and the second husband of the widow (*y*). Chap. II.
Sect. 2.

If one of the next of kin of a foreigner obtains administration here, pending proceedings abroad to ascertain who the next of kin are, an action for a receiver can be maintained by a person claiming as next of kin (*z*). Applications to enforce trusts of a deed of arrangement must be made to the court having jurisdiction in bankruptcy: application for a receiver should be made to such courts (*a*). Receiver
pending
proceed-
ings
abroad.

Deeds of
arrange-
ment.

SECTION 3.—PENDING A GRANT OF PROBATE OR LETTERS OF ADMINISTRATION.

During a litigation in the Ecclesiastical Court of probate or administration, the Court of Chancery would entertain a bill for the mere preservation of the property of the deceased till the litigation was determined, and would appoint a receiver, although the Ecclesiastical Court might, by appointing an administrator, have provided for the collection of the effects *pendente lite* (*b*). It was indeed, a matter of course, where no probate or administration had been granted, for the Court of Chancery to appoint a receiver, pending a *bond fide* litigation in the Ecclesiastical Court to determine the right to probate or administration, unless a special case was

(*y*) *Podmore v. Gunning*, 7 [1916] 1 K. B. 382.
Sim. 644.

(*z*) *Transatlantic Co. v. Pietroni*, John. 604. (*b*) *Watkins v. Brent*, 1 M. &
C. 102; *Wood v. Hitchings*, 2
Beav. 289, on appeal, 4 Jur.

(*a*) See Deeds of Arrangement Act, 1914; and *Re Wilson*, 858; *De Feucheres v. Dawes*, 5
Beav. 110.

Chap. II.
Sect. 3.

made out for not doing so (c). In cases where the representation was in contest and no person had been appointed executor or administrator, the court would interfere, not because of the contest, but because there was no proper person to receive the assets (d). But in *Whitworth v. Whyddon* (e), where the person named as executor in the will was in possession of the property of his testator, the court refused to burden the estate with the expenses of a receiver, inasmuch as the property was of trifling value, and no sufficient ground had been shown to warrant the interference of the court.

Appoint-
ment of
receiver
before
Probate by
Chancery
Division.

Under the present practice, in order to protect the assets, the Chancery Division will, in an action for the administration of the estate of the deceased, appoint a receiver pending a grant of probate or letters of administration (f); where there is a *lis pendens* in the Probate Division the application should, *prima facie*, be made to that court for a receiver *pendente lite* (g); but the existence of such proceedings does not displace the jurisdiction of the Chancery Division; thus, where proceedings for

(c) *Rendall v. Rendall*, 1 Ha. 154, *per* Wigram, V.-C.; *Parkin v. Seddons*, L. R. 16 Eq. 36.

(d) *Watkins v. Brent*, 1 M. & C. 102; *Grimston v. Turner*, 18 W. R. 724; (1870), W. N. 93. Before the grant of administration a receiver and manager may be appointed to carry on the business of an intestate: *Blackett v. Blackett*, 19 W. R. 559; *Re Wright*, 32 Sol. J. 721.

(e) 2 Mac. & G. 55.

(f) *Re Oakes*, *infra*; *Re Wenge*, [1911] W. N. 129; and see *Re Shephard*, 43 Ch. D. 131;

Macleod v. Lane, 2 Times Rep. 322; *Re Dawson*, 75 L. J. Ch. 201; *In the goods of Pryse*, [1904] P. 304; *Re Clark*, [1910] W. N. 234. Under the old practice it was held that an action to protect and also to administer the estate was irregular: *Overington v. Ward*, 34 Beav. 175.

(g) *Re Parker*, 54 L. J. Ch. 69; and see *Re Moore*, 13 P. D. 36; *Re Green* (1895), W. N. 69. For a case in which an action for a receiver of real estate was transferred to the P. D., see *Barr v. Barr* (1876), W. N. 44.

obtaining probate had not been commenced until after the motion for a receiver has been launched, the Chancery Division appointed a receiver (*h*). Entering a *caveat* though warned by the executor is not a *lis pendens* for this purpose (*i*). The appointment is an *interim* appointment only, and is usually made to expire within a few days of a grant being obtained (*k*). In order to give the Chancery Division jurisdiction to make the appointment, an action must have been commenced in that Division, and the writ or originating summons ought specifically to claim a receiver (*l*): the person named in the will as executor or the person entitled to take out administration is usually made defendant.

Upon the death of a sole executor against whom an action has been commenced in the Chancery Division for the administration of the estate of his testator, an *interim* receiver will be appointed in such action pending a fresh grant being obtained, if the assets are in peril (*m*). In such cases a receiver will be appointed before (*n*) or after (*o*) judgment, and although there is no living defendant on the record (*p*).

If probate or administration had been granted, the

(*h*) *Re Oakes*, [1917] 1 Ch. 230.

(*i*) *Salter v. Salter*, [1896] P. 291.

(*k*) *Re Clark*, [1910] W. N. 234; but even under the old practice a bill was not demurrable in such a case because it asked for a receiver generally (*Major v. Major*, 8 Jur. 797); the appointment may be extended if there is jeopardy, on the proper parties being added.

(*l*) *Re Wenge*, [1911] W. N. 129; *Re Oakes*, *supra*.

(*m*) *Re Clark*, [1910] W. N. 234, following *Cash v. Parker*, 12 Ch. D. 293; *Re Shephard*, 43 Ch. D. 131; and see *Mullane v. Aherne*, 28 L. R. Ir. 105.

(*n*) *Re Clark*, [1910] W. N. 234.

(*o*) *Cash v. Parker*, 12 Ch. D. 293.

(*p*) *Re Clark*, *supra*.

Death of
executor
sole
defendant.

Receiver
pending
proceed-
ings to
recall
probate.

Chap. II.
Sect. 3.

circumstance that a suit was pending in the Ecclesiastical Court (q) to recall or revoke probate or administration, was not of itself a sufficient ground for the Court of Chancery, as of course, to interfere to prevent the parties to whom probate or administration had been granted, from using those powers which it conferred upon them. If probate or administration had been properly granted, the Court of Chancery would not appoint a receiver pending litigation in the Ecclesiastical Courts to recall or revoke probate or administration, unless a special case were made out for doing so (r). The general principle was stated by Turner, L.J., in *Devey v. Thornton* (s) to be that, where there is a legal title to receive, the court ought not to interfere, unless the legal title is abused, or there is proof that it is in danger of being so. But if a *prima facie* case of fraud were made out (t), or if it were made to appear that the legal right to receive the assets was being abused, or was in danger of being abused, whether from insolvency or otherwise (u), the court would appoint a receiver. So, also, would it appoint a receiver, if it appeared from all the circumstances of the case that there was no executor or administrator in existence with the right and power to act as such, notwithstanding there

(q) The jurisdiction of which in this respect is now vested in the Probate Division.

(r) *Watkins v. Brent*, 1 M. & C. 102; *Newton v. Ricketts*, 11 Jur. 662; *Rendall v. Rendall*, 1 Ha. 154.

(s) 9 Ha. 229.

(t) *Rutherford v. Douglas*, 1 Sim. & St. 111, n.; *Watkins v. Brent*, 1 M. & C. 102; *Dimes v. Steinberg*, 2 Sm. & G. 75. In

order to interfere against the legal title of the executor it is necessary to establish by evidence strong presumption against the will: *Dew v. Clarke*, 1 Sim. & St. 114; per Sir J. Leach; see also *In the goods of Moxley*, [1916] 2 Ir. R. 145.

(u) *Ball v. Oliver*, 2 V. & B. 96; *Newton v. Ricketts*, 11 Jur. 662; *Devey v. Thornton*, 9 Ha. 229.

was no ground laid for interference in respect of any improper conduct of the parties (x). Where, accordingly, an executor, by agreeing with his opponents that the question as to the validity of the supposed testamentary papers should be tried in the suit to recall probate, had treated himself as not being complete executor, a receiver was appointed (y). "If," said Wigram in *Rendall v. Rendall* (z), "the question be whether the party claiming to be executor is so *de jure* or not, a receiver will be appointed." So, also, in *Marr v. Littlewood* (a), Lord Cottenham appointed a receiver upon the application of the actual executor, pending a suit to annul probate, upon the ground that the opposing party, by having given notice to the debtors to the estate not to pay to the plaintiff, the actual executor, had destroyed the effect of the probate, and produced by his own act an incapacity on the part of the executor to proceed under the probate in collecting and preserving the assets (b).

In the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), which abolished the testamentary jurisdiction of the Ecclesiastical Courts, and established a Court of Probate, it was enacted by section 70, that, pending any suit touching the validity of a will, or for obtaining, recalling, or revoking any probate or grant of administration, the Court of Probate might appoint an administrator of the personal estate of the party deceased, and that the administrator so appointed should have all the rights and powers of a general administrator other than the right of distributing the residue of such personal estate (c).

(x) *Watkins v. Brent*, 1 M. & C. 97. (b) 1 Ha. 156, *per* Wigram, V.-C.

(y) *Ib.* (c) See, also, 21 & 22 Vict.

(z) 1 Ha. 155. c. 95, s. 21.

(a) 2 M. & C. 454.

Chap. II. Sect. 3. The 71st section of the same Act empowered the Court of Probate to appoint a receiver of the real estate of any deceased person pending a suit touching the validity of his will by which his real estate might be affected ; and declared that the receiver so appointed should have power to receive the rents and profits of the real estate, and to let and manage the same (*d*). In order that the Probate Division may have jurisdiction under this Act, there must be an actual *lis pendens* before it : the entering of a *caveat*, though warned by the executor, is not sufficient (*e*).

The court has jurisdiction under sections 70 and 71 to appoint the same person administrator and receiver *pendente lite* of the estates of a person whose sole executor has died, and of such executor, where an action is pending as to the testamentary dispositions of such executor, although there is no litigation pending relative to the estate of the original testator (*f*).

If the deceased died since 1897 a grant *pendente lite* may include both real and personal estate, if the heir has notice (*g*) ; and in a proper case the citation of the heir may be dispensed with (*h*). The grant terminates with the decree (*i*), or the decision of an appeal therefrom (*k*).

(*d*) See *Neale v. Bailey*, 23 W. R. 418 ; see also 21 & 22 Vict. c. 95, ss. 21, 22 ; and, as to costs of administrator and receiver, *Taylor v. Taylor*, 6 P. D. 29.

(*e*) *Salter v. Salter*, [1896] P. 291.

(*f*) *Shorter v. Shorter*, [1911] P. 184 ; see, however, *Salter v. Salter*, [1896] P. 291.

(*g*) *Wiggins v. Hudson*, 80 L. T. 296. If the deceased died prior to 1898 a separate appointment as receiver of real estate is drawn up by the Registrar.

(*h*) *Re Messiter Terry*, 24 T. L. R. 465.

(*i*) *Wieland v. Bird*, [1894] P. 262.

(*k*) *Taylor v. Taylor*, 6 P. D. 29.

The application is made by motion; a party to the litigation is not appointed except by consent (l). If the parties to the litigation do not agree upon a nominee, the court may refer it to the Registrar to nominate a person to act.

Chap. II.
Sect. 3.

There is nothing in the Court of Probate Act, 1857, which ousts the jurisdiction of the Chancery Division, by which orders appointing a receiver pending a grant are still made if there is no *lis pendens*, and where the assets are in jeopardy (m), and as the Probate Division will not withhold a grant or impound probate on the ground of jeopardy, application for a receiver should be made to the Chancery Division in such a case (n). But if an administrator *ad litem* has been appointed by the Probate Division, the Chancery Division will not appoint a receiver unless a special case can be made out; for the administrator can do everything that is necessary for the protection of the property (o).

As soon as the Chancery court finds some one clothed by the Probate court with the character of an administrator, even although he is only appointed *pendente lite*, it will discharge the order for a receiver, and will allow the administrator to receive the estate, but will hold its hand over his dealings with it, and make such orders upon him as it may think proper (p).

The Probate court may appoint an administrator *pendente lite*, if it is just and proper to do so, although a receiver has been appointed by the Chancery Division in

(l) See *Shorter v. Shorter*, [1911] P. 184.

(m) See *ante*, p. 26.

(n) *In the goods of Moxley*, [1916] 2 Ir. R. 145.

(o) *Veret v. Duprez*, L. R. 6 Eq. 330; *Parkin v. Seddons*, L. R. 16 Eq. 34.

(p) *Per Lord Penzance*, L. R. 1 P. & M. 733.

Chap. 11. an action pending between the same parties, and affecting
 Sect. 3. the same property as the testamentary action (q). The receiver appointed by the Chancery Division will sometimes be appointed administrator *pendente lite* (r); and a grant outright may be made to him, e.g., where the next of kin though cited are unable to find security (s), or do not apply for a grant (t).

The Court of Probate had, and the Probate Division now has, power under section 70 of the above Act of 1857 to appoint an administrator *pendente lite* in contested testamentary and administration proceedings, on the application of a person not a party to the proceedings. In an administration suit, accordingly, which was likely to be protracted, the Court of Probate appointed an administrator *pendente lite* at the instance of a creditor who was not a party to the suit (u). So, also, where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the Chancery Division in which a receiver had been appointed, the President of the Probate Division, on the application of a creditor not a party to the testamentary suit, appointed an administrator *pendente lite* (x).

Pleading. Under the old practice where a receiver was sought to protect the estate pending a grant, administration of the estate could not be claimed in the same suit (y). It

(q) *Tichborne v. Tichborne*, L. R. 1 P. & M. 730.

(r) *In the goods of T. Evans*, 15 P. D. 215; *In the estate of Cleaver*, [1905] P. 319.

(s) *In the goods of G. Moore*, [1892] P. 145.

(t) *In the goods of Mayer*, 3 P. & M. 39.

(u) *Tichborne v. Tichborne*,

L. R. 1 P. & M. 730.

(x) *In the goods of Evans*, 15 P. D. 215; and see *In the Estate of Cleaver*, [1905] P. 319, application made by plaintiffs in Chancery action.

(y) See *De Feucheres v. Dawes*, 5 Beav. 110; *Overington v. Ward*, 34 Beav. 175.

appears, however, that under the modern practice the writ may claim both a receiver pending a grant (z), and administration after the grant has been made (a). Chap. II.
Sect. 3.

The court, though it will appoint a receiver to get in a testator's estate in aid of an administrator *pendente lite*, will not appoint a receiver over property of a testator claimed by a party independently of the will, though his title may be impeached on the ground of fraud. Where, pending a contest in the Ecclesiastical Court between the plaintiff and the defendant, as to the validity of two wills, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by her to the defendant, the court refused to appoint a receiver of the property comprised in the assignment, that being claimed by the defendant independently of either will (b).

Though a receiver has been appointed during a litigation in the proper court respecting the validity of a will, the court will not, on that account alone, order the person named as executor to pay into court money in his hands belonging to the testator's estate received previously to the appointment of the receiver (c).

An action to appoint a receiver pending litigation as to probate or administration should not be brought to a hearing (d). A motion, therefore, to dismiss such action for want of prosecution will be refused with costs (e). But the court will make a decree by consent

(z) See p. 27, *supra*.

Ha. App. 63.

(a) See *per* Eve, J., in *Re Wenge*, [1911] W. N. 129.

(d) *Anderson v. Guichard*, 9

Ha. 275; but see *Carrow v. Ferrior*, 16 W. R. 841, 1072.

(b) *Jones v. Goodrich*, 10 Sim. 327; on appeal, 4 Jur. 98.

(e) *Edwards v. Edwards*, 17

(c) *Reed v. Harris*, 7 Sim. 639; *Edwards v. Edwards*, 10

Jur. 826.

Chap. II. for the continuance of the receiver, and for payment of
 Sect. 3. costs, and the investment of the fund in court (*f*). After the litigation is over in the Probate Court, the practice is to discharge the receiver and dispose of the costs; and, if it appears that there was no reasonable ground for instituting the action at all, the court may order the plaintiff to pay all the costs, although a receiver has been appointed (*g*).

Receiver pending dispute as to the administration of the estate of a British subject dying abroad. In *Hervey v. Fitzpatrick* (*h*) the chief judge of the Gold Coast, as judicial assessor, claimed to be official administrator of a British subject who had died intestate and domiciled there, and to be entitled to a commission for administering his estate. He transmitted part of the assets to this country, and came himself on leave of absence for a short time. The father of the intestate obtained letters of administration, and brought an action against the judicial assessor, praying a receiver. There was no evidence to show any impropriety of conduct on the part of the assessor; but the court held that it had jurisdiction, as the assets and the assessor were both in this country, and, there being danger of his taking the assets again out of the jurisdiction, appointed a receiver until the matter should be adjudicated on at the hearing.

SECTION 4.—IN CASES BETWEEN MORTGAGOR AND MORTGAGEE (*i*).

Sect. 4. Before the Judicature Acts, a mortgagee having the legal estate could not, except under special circumstances,

(*f*) *Anderson v. Guichard*, 9 Ha. 275.

(*h*) *Kay*, 421.

(*g*) *Barton v. Rock*, 22 Beav. 81, 376.

(*i*) Cases between a company and its incumbrancers are treated *infra*, pp. 59 ff.

obtain from the Court of Chancery the appointment of a receiver over the mortgaged property, because he could take possession under his legal title (*k*). But since the Judicature Acts the court (*l*) will appoint a receiver at the instance of a mortgagee having the legal title. The court does this, not because the mortgagee has in fact less power than he formerly had to take possession, but because there is an obvious convenience in appointing a receiver, so as to prevent a mortgagee from being in the unpleasant position of a mortgagee in possession (*m*).

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The appointment of a receiver at the instance of a legal mortgagee is not a matter of course. A case must be made out for the appointment (*n*), and the court has a discretion in the matter (*o*).

A legal mortgagee, who has once taken possession of the mortgaged property, cannot give up possession whenever he likes, and, as a general rule, the court will not appoint a receiver at his instance (*p*).

Where an action for foreclosure is pending the court will usually appoint a receiver at the instance of a legal mortgagee, and may do so, even if he is in possession (*q*). The fact that the security contains an express power to appoint a receiver, or that such power arises under the Conveyancing Act, 1881 (*r*), does not prevent the court

(*k*) *Berney v. Sewell*, 1 J. & W. 648; *Sturch v. Young*, 5 Beav. 557; *Cremen v. Hawkes*, 2 J. & L. 680; *Ackland v. Gravener*, 31 Beav. 484; *Pease v. Fletcher*, 1 Ch. D. 273.

(*l*) As to mortgages of metalliferous mines in Cornwall the County Court has exclusive jurisdiction; see Statutes referred to in note (*f*), p. 184.

(*m*) *Re Pope*, 17 Q. B. D. 749; per Cotton, L.J., *Re Prytherch*, 42 Ch. D. 590.

(*n*) *Mason v. Westoby*, 32 Ch. D. 206.

(*o*) *Re Prytherch*, 42 Ch. D. 590.

(*p*) *Ib.*

(*q*) *Tillett v. Nixon*, 25 C. D. 238.

(*r*) See Chapter XIV.

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Sect. 4. from intervening to make the appointment. And if the power of appointing a receiver is not exercised *bonâ fide* the court will appoint its own receiver (*s*).

Prior to the Judicature Act of 1873, it was held that, where an annuity was charged on land, with a power of distress superadded by the statute 4 Geo. II. c. 28, the annuitant could help himself, and was not entitled to the appointment of a receiver (*t*). But, since the Act of 1873, it is conceived that the court has a discretion (*u*).

After judgment for foreclosure absolute, the action being at an end, the plaintiff cannot obtain an order for a receiver, even though the conveyance of the foreclosed property has not been settled. In a proper case, however, the court may open a foreclosure, where special circumstances are shown for the reconsideration of the judgment (*v*).

Mortgagee
of tolls,
&c., may
have a
receiver.

A mortgagee of turnpike or other tolls might, under the old procedure, apply to the Court of Chancery for a receiver, instead of taking steps to obtain possession at law (*x*). "Under an ordinary mortgage," said Turner, L.J. (*y*), "the mortgagee when he enters into possession holds for his own benefit. Under a mortgage of this description he becomes, when he enters into possession, liable to the other mortgagees to the extent of their interest. This liability would entitle him, upon possession taken, to come to the court to have it ascertained

(*s*) See *Re Maskelyne British Typewriter*, [1898] 1 Ch. 133; and Chapter XIV.; see also *Re Slogger Automatic Feeder Co.*, [1915] 1 Ch. 478.

(*t*) *Sollory v. Leaver*, L. R. 9 Eq. 22; and see *Kelsey v. Kelsey*, L. R. 17 Eq. 495.

(*u*) *Pease v. Fletcher*, 1 Ch. D. 273; *Mason v. Westoby*, 32 Ch. D. 206; *Re Prytherch*, 42 Ch. D. 590.

(*v*) *Wills v. Luff*, 38 Ch. D. 197

(*x*) *Lord Crewe v. Edleston*, 1 D. & J. 93.

(*y*) *Ib.* 109.

what is due upon the other mortgages, and for a receiver to aid him in the due application of the tolls ; and if this court can be called upon to appoint a receiver immediately after the possession recovered at law, it can hardly be necessary that the proceedings at law should first be taken."

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The right to the appointment of a receiver is one of the rights which accrue to an equitable mortgagee whose security has become enforceable as one of the steps in realisation (z). An equitable mortgagee has, in the absence of express agreement, no means of taking possession : he cannot by notice to tenants enforce payment of their rents to him (a). If, therefore, there is no prior legal incumbrancer in possession the court as a matter of right appoints a receiver upon the application of an equitable mortgagee whose security has become enforceable either under its express terms or by operation of law (b).

There is ground for granting a receiver at the instance of an equitable incumbrancer if the payment of interest is in arrear though the principal is not payable (c), or if there is reason to apprehend that the property is in peril or insufficient to pay the charges on it (d).

(z) See *Re Crompton & Co., Ltd.*, [1914] 1 Ch. 967 ; as to debenture holders, see section 6, *infra*.

(a) *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 703 ; though he may appoint a receiver under the Conveyancing Act, 1881.

(b) See *Re Crompton & Co., Ltd.*, *supra* ; *Dalmer v. Dashwood*, 2 Cox 383 ; *Davis v. Duke of Marlborough*, 2 Sw. 137 ; *Berney v. Sewell*, 1 J. & W. 648 ;

Tanfield v. Irvine, 2 Russ. 151 ; *cf. Cooke v. Creswell*, 12 W. R. 299 ; *Langton v. Langton*, 7 D. M. & G. 30.

(c) *Burrows v. Molloy*, 2 J. & L. 521 ; *Wilson v. Wilson*, 2 Keen 249 ; *Hopkins v. Worcester and Birmingham Canal Co.*, 6 Eq. 447.

(d) *Herbert v. Greene*, 3 Ir. Ch. 273 ; *Moore v. Malyon*, 33 Sol. J. 699 ; and p. 77, *post*.

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The existence of a prior legal mortgage forms no bar to the appointment of a receiver at the instance of an equitable encumbrancer, unless the legal mortgagee is in possession (e). The court will not allow a prior legal incumbrancer to object to the appointment by anything short of an assertion of his legal right of taking possession or appointing a receiver (f); and the fact that the legal mortgagee has a right to appoint a receiver by the express terms of his security makes no difference to this rule (g).

If a subsequent incumbrancer be in possession of the estate, and a prior legal incumbrancer cannot recover at law by ejectment, by reason of some outstanding prior legal estate, a receiver may be appointed (h). In *White v. Bishop of Peterborough* (i), a case relating to transactions which took place between the years 1805 and 1814, when a judgment creditor might take in execution the profits of a rectory, a sequestration creditor had got possession of the profits of the rectory. The sequestration creditor was in fact the third incumbrancer. The first incumbrance was a demise for years to secure an annuity. The second incumbrance was also an annuity secured by a term. The sequestration creditor having got into possession, Lord Eldon, on bill filed by the second incumbrancer, held that he was entitled to a receiver, inasmuch as he could not succeed in ejectment, because there was a prior legal estate which might have been set up against him. "Where," said Lord Eldon (k), "a

(e) *Post*, p. 41; and see *Norway v. Rowe*, 19 Ves. 153.

(f) *Silver v. Bishop of Norwich*, 3 Sw. 114 n.; *Metropolitan Amalgamated Estates*, [1912] 2 Ch. 497.

(g) *Bord v. Tollemache*, 1

N. R. 177; *Re Metropolitan Amalgamated Estates*, *supra*.

(h) *Silver v. Bishop of Norwich*, 3 Sw. 116 n.

(i) 3 Sw. 109.

(k) 3 Sw. 116.

creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is in contemplation of this court in the same state as any other creditor who has taken out execution, and a creditor having taken out execution cannot hold property against an estate created prior to his debt. If by *elegit* one creditor is in possession of one moiety, and another creditor of another moiety, that is good against the creditor; but if there is an antecedent estate, by virtue of which an ejectment may be brought, it does not appear that against that estate the creditors may hold." In the almost contemporaneous case of *Silver v. Bishop of Norwich* (l), it was held that the grantee of an annuity, or creditor whose charge was secured by being vested in the trustees of a term, was entitled to a receiver as against judgment creditors, who had obtained possession under writs of *elegit* or sequestration, if there was a legal estate, prior to the term securing the grantee's annuity, which barred him from proceeding at law by ejectment. Lord Eldon intimated that, in such a case, the plaintiff should show on the pleadings the existence of such an estate as would defeat proceedings in ejectment; and that, if it did not appear on the pleadings that ejectment could not be maintained, a receiver would not be appointed (m).

If the estate is in the possession of judgment creditors, and the plaintiff has acquired an estate which, if it had been legal, might have enabled him to turn out the judgment creditors, but, his estate being equitable, he cannot proceed at law, the case is that of an equitable creditor with an estate for securing his debt, applying to the Court in Chancery to have execution given to him there. The

(l) 3 Sw. 112 n.

wich, 3 Sw. at p. 116 n.

(m) *Silver v. Bishop of Nor-*

Chap. II. principle on which a receiver was appointed was this :
 Sect. 4. when a bill was filed stating that the plaintiff had an equitable estate, and consequently could not recover at law, but it was clear that he might in equity, the court would appoint a receiver, not disturbing those entitled to previous beneficial interests (*n*).

Parties. Where second or third incumbrancers sue for a receiver it is not necessary to make the prior mortgagee or mortgagees parties, though the court will see their rights are not prejudiced (*o*) : subsequent incumbrancers as well as the mortgagor should be made defendants (*p*). It is usual in making the appointment of a receiver at the instance of an equitable incumbrancer to insert in the order the words " without prejudice to the rights of prior incumbrancers who may think fit to take possession by virtue of their respective securities " (*q*). These words appear to enable a legal mortgagee to take possession without applying for leave to the court (*r*). If these words are omitted the rights of the legal mortgagee to take possession or appoint a receiver remain unaffected (*s*), but he must obtain the leave of the court to enforce those rights (*t*). Though the legal mortgagee may have ap-

(*n*) 2 Wils. Ch. 151.

(*o*) See *Norway v. Rowe*, 19 Ves., p. 152.

(*p*) *Dalmer v. Dashwood*, 2 Cox 378 ; *Rose v. Page*, 2 Sim. 471 ; but see *Price v. Williams*, Coop. 31 ; a receiver may, however, be appointed in the absence of some of the subsequent incumbrancers : see *Re Crigglestone Coal Co.*, [1906] 1 Ch. 523.

(*q*) Seton, 7th ed., 765, 798 ; see *Lewis v. Zouche*, 2 Sim. 388 ;

Smith v. Lord Effingham, 2 Beav. 232 ; *Underhay v. Read*, 20 Q. B. D. 209.

(*r*) *Underhay v. Read*, 20 Q. B. D. 207 ; see *Re Metropolitan Amalgamated Estates (infra)*, where the point was raised, but *Underhay v. Read* was not referred to.

(*s*) See *Davis v. Duke of Marlborough*, 2 Sw. 137, 138.

(*t*) *Re Metropolitan Amalgamated Estates*, [1912] 2 Ch. 497.

pointed a receiver at the date when the court in ignorance of that fact appoints a receiver at the instance of a puisne incumbrancer, the latter appointment is effective, though the court's receiver will be at once displaced upon the application of the legal mortgagee, as from the date of service of such application (u). Chap. II.
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A receiver may be appointed on the application of an equitable mortgagee, by deposit, of leasehold property, against a person in possession under an agreement with the mortgagor for an assignment of the latter's interest in the property (x). And though the security of the applicant may be one which gave him no right to be considered a mortgagee of the estate, but only made the rents a fund for payment of interest and of premiums upon a policy of insurance, out of the produce of which the principal was to be paid, a receiver will be appointed (y). Instances
of exercise
of juris-
diction.

In *Holmes v. Bell* (z) a receiver of the rents and profits of an estate, belonging to the defendants as tenants in common, was appointed at the suit of equitable mortgagees, though one of the mortgagors was out of the jurisdiction, the whole of the rents being received by the other. A receiver may be appointed over the entirety of a mortgaged property at the instance of a mortgagee of an undivided share (a). Tenants in
common
mort-
gagors.

Receiver
over whole
property
at instance
of owner
of a share.

The court will not appoint a receiver, at the instance of an equitable incumbrancer, against a prior legal mortgagee in possession, as long as anything remains due to Receiver
not ap-
pointed
against
prior legal
mortgagee
in posses-
sion at
instance of
second
mortgagee.

(u) *Re Metropolitan Amalgamated Estates*, [1912] 2 Ch. 497; and see *post*, p. 190.

(x) *Reid v. Middleton*, T. & R. 455.

(y) *Taylor v. Emerson*, 4 Dr. & War. 122; see also *Cummins v.*

Perkins, [1899] 1 Ch. 16; as to right of creditor of a building society, see *Baker v. Landport, etc., Building Society*, 56 Sol. J. 224. (z) 2 Beav. 298.

(a) *Sumsion v. Cruttwell*, 31 W. R. 399.

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the latter on the mortgage security. A prior legal mortgagee in possession, having something due to him, is entitled to retain that possession until he is fully paid. A receiver will not be appointed against him except on his own confession that he has been paid off, or on his refusal to accept what is due to him (*b*). If he swears that something is due to him on his mortgage security, no receiver will be appointed against him (*c*), and the only course is to pay him off according to his own statement of the debt (*d*). It is not necessary, in order to preserve his possession, that he should be able to state with great precision what sum is due to him. It is enough if he can swear that something is due to him (however small it may be) on the security (*e*). If he distinctly swears that something is due to him the court will not try the truth of the statement by affidavits against it (*f*). If, however, he will not state that something is due to him, the court will appoint a receiver (*g*). The statement must, in order to satisfy the court, be a distinct and positive statement. It is not enough if it merely amounts to a vague assertion (*h*), or if the mortgagee says in general terms that he believes that, when the accounts are taken, some particular sum will be found due, without supporting the statement by accounts which will serve to test its truth (*i*). Nor can the incomplete state of his

(*b*) *Berney v. Sewell*, 1 J. & 558.

W. 649.

(*c*) *Quarrell v. Beckford*, 13
Ves. 377.

(*d*) *Berney v. Sewell*, 1 J. &
W. 647.

(*e*) *Quarrell v. Beckford*, 13
Ves. 377.

(*f*) *Rowe v. Wood*, 2 J. & W.

(*g*) *Quarrell v. Beckford*, 13
Ves. 377; *Rowe v. Wood*, 2 J. &
W. 558.

(*h*) *Hiles v. Moore*, 15 Beav.
181.

(*i*) *Hiles v. Moore*, 15 Beav.
181.

accounts be admitted as an excuse for his not being able to say that something is due to him. If a mortgagee in possession keeps his accounts so negligently that neither he, nor a subsequent incumbrancer, nor the owner of the estate can ascertain what is due, the court may assume that nothing is due, and appoint a receiver (*k*). Time, however, may be given him to make an affidavit of the debt (*l*).

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The rule, that a receiver will not be appointed against a prior legal mortgagee in possession as long as anything remains due on the mortgage security, applies equally, whether the priority is original, or has been acquired subsequently by an assignment of the mortgage (*m*). Where, accordingly, as between two equitable incumbrancers, the one later in date has acquired the legal possession, the Court of Chancery would not, at the suit of the one who was prior in date, appoint a receiver (*n*).

The last-mentioned rule, however, only applies as long as anything is due with reference to which the mortgagee has a right to retain possession (*o*). It is not the rule of the court that a third mortgagee, who has advanced his moneys with notice of the second mortgage, and who has taken possession, and has then brought up a first incumbrance, can retain it as against a second mortgagee, after the first mortgage has been paid off (*p*). The rule, as to not appointing a receiver against a prior legal mortgagee

(*k*) *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 180.

(*l*) *Codrington v. Parker*, 16 Ves. 469.

(*m*) *Berney v. Sewell*, 1 J. & W. 648; *Hiles v. Moore*, 15 Beav. 181; *Bates v. Brothers*, 17

Jur. 1174; 2 Sm. & G. 517.

(*n*) *Bates v. Brothers*, *ubi supra*.

(*o*) *Codrington v. Parker*, 16 Ves. 469.

(*p*) *Hiles v. Moore*, 15 Beav. 181.

Chap. II. in possession, has been held to apply in favour of persons
Sect. 4. in possession entitled to a mortgage and prior charges on the estate, though they had applied part of the rents in payment of the interest on those charges, instead of discharging the principal of the mortgage; it being the proper course, as between the tenant for life and the owners of the inheritance, to keep down such interest out of the rents and not to treat the surplus rents, after payment of the interest of the unpaid part of the principal, as applicable to the discharge of such unpaid principal (g).

In order to deprive an equitable mortgagee of his right to a receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits. A mere possession as tenant is not sufficient. An incumbrancer who is in possession, not in that character, but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver. In an old Exchequer case, the plaintiff, a second mortgagee, applied for a receiver of the rents of the mortgaged estate. The application was resisted by one of the defendants, who had purchased from the plaintiff part of his mortgage, and was in possession, as tenant, of a portion of the estate, the rent of which was equal to the interest which he was entitled to receive in virtue of his purchase. He contended that to appoint a receiver over the above portion of the estate would be only a useless expense, inasmuch as he would be entitled to receive back as interest what he would have to pay as rent. The court, however, considered that he could not unite his two characters of mortgagee and tenant, and that his

(g) *Faulkner v. Daniel*, 3 Ha. 204 n. ; 10 L. J. Ch. 34.

possession in the latter character could not be set up against the plaintiff's right and title as mortgagee (r). Chap. II.
Sect. 4.

Still, although a receiver will not, as a general rule, be appointed against a prior legal mortgagee in possession, the court may, if a case of gross mismanagement of the estate be made to appear, deprive a mortgagee of possession by appointing a receiver; but to warrant such an interference the mismanagement must be of a clear and specific nature (s). In *Rowe v. Wood* (t), a motion for the appointment of a receiver against a mortgagee of mines, who had become a partner by purchasing shares in them, upon the grounds of mismanagement and exclusion of the mortgagor, was refused; it not being shown, and the mortgagee not admitting, that the mortgage was satisfied. It was held that the rights and duties of a person in that situation were not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner, and that, if a first mortgagee in possession can in any case be deprived of that possession on the ground of mismanagement, it must be mismanagement of a clear and specific nature. The court, however, declared that the plaintiff had a clear right, subject to the equities which might ultimately be declared between the parties, to insist that regular accounts should be kept of all receipts, payments, and transactions relative to the mines, and to have constant access for the purpose of inspecting the accounts; and further that, subject to those equities, he had a clear right to control the working of the mines, and that if he was impeded in the exercise of his rights he might come to the court again (u).

(r) *Archdeacon v. Bowes*, 3 Anst. 752.

(t) *Ib.*

(u) *Ib.*, p. 559.

(s) *Rowe v. Wood*, 2 J. & W. 553.

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Manager.

If a mortgagee's security includes (either expressly or by implication) not only land, but a business carried on upon the land, the court may, upon his application, appoint a manager as well as a receiver (x).

In such cases, if the mortgagee elects to have the receiver also appointed manager, the goodwill of the business forms part of the property entrusted to the receiver, who must, therefore, do all acts necessary to preserve it: he cannot, therefore, without the express permission of the court (y), disregard contracts entered into by the mortgagor, because to do so would result in the destruction of the goodwill (z). If, however, the mortgagee elects to have a receiver only, the latter may disregard contracts entered into by the mortgagor, because he is under no obligation to preserve the goodwill (a).

It seems that, although the court will not appoint a manager of licensed premises at the instance of a mortgagee whose security does not include the goodwill (b), it may, where the licences are in jeopardy, authorise the receiver to keep the house open as licensed premises and to do all acts necessary to preserve the licences (c).

Courts
(Emer-
gency
Powers)
Acts.

If the mortgage was created prior to 4th August, 1914, then, so long as the Courts (Emergency Powers) Acts

(x) *County of Gloucester Bank v. Rudry, &c., Colliery Co.*, [1895] 1 Ch. 629; and see Chapter IX.

(y) *Infra*, pp. 295 *et seq.*

(z) See *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468; *infra*, pp. 257 *et seq.*

(a) See *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468, *per* Cozens-Hardy, M.R., and Moulton, L.J.

(b) *Whitley v. Challis*, [1892] 1 Ch. 64.

(c) See *Charrington v. Camp*, [1902] 1 Ch. 386; *Leney & Sons, Ltd. v. Callingham*, [1908] 1 K. B. 79, where such an order was made on the application of lessors seeking to recover possession.

remain in force (*d*), the leave of the court must be obtained in manner provided for by those Acts and the rules made thereunder before any proceedings for foreclosure or sale can be commenced (*e*). Chap. II.
Sect. 4.

SECTION 5.—IN CASES BETWEEN DEBTOR AND CREDITOR.

General creditors may, like specific incumbrancers, have a receiver of the property of their debtor (*f*), provided they can show to the court the existence of circumstances creating the equity on which alone the jurisdiction arises (*g*). Thus, where it is made to appear that an executor or devisee is wasting the personal or real estate, a receiver may be appointed at the instance of simple contract creditors, who may also obtain the appointment of a receiver of real and personal estate pending a grant of probate (*h*). Sect. 5.
Receiver appointed at suit of general creditor.

Under the old law, if the creditors could show that the personalty was insufficient for payment of the debts, a receiver would be appointed over the real estate (*i*) against

(*d*) Twelve months from the date to be fixed as the end of the War of 1914, see 8 & 9 Geo. 5, c. 59, and 10 Geo. 5, c. 5; for Orders in Council see Annual Practice, 1921, p. 1361.

(*e*) See Courts (Emergency Powers) Acts, 1914, s. 1 (1), and 1916 (No. 2), s. 1 (1) (*b*), and rules. The Acts and Rules are set out in the Annual Practice. See also Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 7.

(*f*) *Owen v. Homan*, 4 H. L.C. 997, where (at p. 1036) the difference between general creditors, seeking to obtain pay-

ment by means of a sort of equitable action of *assumpsit* or debt out of a married woman's separate property, and specific appointees of a portion of that property, was pointed out by the Lord Chancellor; *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272; *Largan v. Bowen*, 1 Sch. & Lef. 296.

(*g*) See *Re Shephard*, 43 Ch. D. 131, 138.

(*h*) Section 2, p. 36.

(*i*) *Jones v. Pugh*, 8 Ves. 71; see, too, *Coope v. Creswell*, 12 W. R. 299; *Topping v. Searson*, 6 L. T. N. S. 450; *Re Dawson*, 75 L. J. Ch. 201.

Chap. II. an infant heir (*k*). Since the Land Transfer Act, 1897,
 Sect. 5. it is unnecessary to appoint a receiver in such cases,
 though one will be appointed by consent, or if the creditor
 can show misconduct by the executors (*l*).

Independently of the Judicature Act, 1873, where a plaintiff has a right to be paid out of a particular fund, the court will appoint a receiver in order to prevent that fund from being dissipated so as to defeat his rights. The appointment of a receiver in such a case is not by way of equitable execution but analogous to it (*m*).

If the real estates over which a receiver is sought are in mortgage, but the mortgagee is not in possession, a receiver will be appointed on the application of creditors, without prejudice to the right of the mortgagee to take possession (*n*).

Still, although general creditors may have a receiver of the property of the debtor, a strong case must be made out to warrant the interference of the court. The court will not, unless a clear case is established, deprive a person of property on which the claimant has no specific claim, in order that, if he establishes his claim as a creditor, there may be assets wherewith to satisfy it (*o*). The anomalous nature of the right when the plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the *interim* inter-

(*k*) *Sweet v. Partridge*, 1 Cox, 1007; *Bryan v. Cormick*, 1 Cox, 433; 2 Dick. 696.

(*l*) *Ante*, section 2, p. 16. 648; *Berney v. Sewell*, 1 J. & W.

(*m*) *Cummins v. Perkins*, [1899] 1 Ch. 16, 19, *per* Lindley, M.R. [1894] 3 Ch., p. 340.

(*o*) *Owen v. Homan*, 4 H. L. C. 997, at p. 1036.

(*n*) *Rhodes v. Mostyn*, 17 Jur.

ference resulting from the appointment of a receiver (p). But the risk of doing a wrong to the defendant in such a case is certainly much greater and more apparent than when a right asserted is a right against some specific fund or estate (q). Chap. II.
Sect. 5.

Before the Judicature Acts, the Court of Chancery exercised a jurisdiction in aid of judgments at law. A judgment creditor who had sued out a writ of *elegit* or *fi. fa.* on his judgment, but found himself precluded from obtaining execution at law on the ground that the debtor had no lands, goods, or chattels, out of which the judgment could be satisfied at law, had a right to come to the Court of Chancery for the appointment of a receiver of the proceeds of the estate of the debtor which could be reached in equity (r). The Court of Chancery, before exercising the jurisdiction, required to be satisfied of two things, first, that the plaintiff in the action had tried all he could to get satisfaction at law; and then, that the debtor was possessed of that particular interest which could not be attached at law (s). A judgment creditor, therefore, before coming to the Court of Chancery for the appointment of a receiver, was required to show that he had sued out the writ of *fi. fa.* or *elegit*, the execution of which was avoided, and that the debtor had no lands, goods, or chattels which could be seized on execution at law (t). But since the Judicature Act of

(p) See *Cummins v. Perkins*, [1899] 1 Ch. 16. as to form of order, *Wells v. Kilpin*, L. R. 18 Eq. 299.

(q) *Owen v. Homan*, 4 H. L. C. 997, at p. 1036. (s) *Per Jessel, M.R.*, 16 Ch. D. 552; *Re Pope*, 17 Q. B. D. 749.

(r) *Smith v. Hurst*, 1 Coll. 705; 10 Ha. 48; *Smith v. Cowell*, 6 Q. B. D. 75; *Ex parte Charrington*, 22 Q. B. D. 191; see, (t) *Smith v. Hurst*, 1 Coll. 705; 10 Ha. 48; *Re Shephard*, 43 Ch. D. 131.

K.R.

4

Chap. II. 1873, which empowers the court to grant a receiver, not
Sect. 5.

only where there is no power to take possession at law, but where there is power to interfere, if it is just and convenient that an order for a receiver should be made, it is not necessary for a judgment creditor who seeks to obtain the appointment of a receiver over the judgment debtor's equitable interest in lands previously to sue out an *elegit* (*u*); nor is it necessary for a judgment creditor, who seeks to obtain the appointment of a receiver over the judgment debtor's equitable interest in personalty previously to issue a *fi. fa.* (*x*).

It was not the practice of the Court of Chancery to appoint a receiver in aid of a judgment at law, unless there was some legal impediment to execution in the ordinary way (*y*). Nor have the Judicature Acts extended in this respect the right to have a receiver appointed against the estate of a legal debtor, although the appointment may now be made in any proceedings (*z*).

The cases in which the court will appoint a receiver at the instance of a judgment creditor depend upon the nature of the property and of the judgment debtor's interest in it: this matter and the principles which guide the court in the exercise of its jurisdiction are dealt with in Chapter III. (*a*).

To enforce
orders in
matrimonial
causes.

A judge of the Probate, Divorce and Admiralty Division, sitting in Divorce, has jurisdiction to enforce orders by the appointment of a receiver under section 25 (8) of the

(*u*) *Ex parte Evans*, 13 Ch. D. 260; *Re Pope*, 17 Q. B. D. 749; see, too, *Hills v. Webber*, 17 Times Rep. 513.

(*x*) *Re Whiteley*, 56 L. T. 746; see, too, *Coney v. Bennett*,

29 Ch. D. 993.

(*y*) *Manchester and Liverpool, &c., Banking Co. v. Parkinson*, 22 Q. B. D. 173, and *post*, p. 131.

(*z*) *Ante*, p. 2.

(*a*) P. 123.

Judicature Act, 1873, but it appears that the usual practice is to enforce orders for payment of alimony or costs by sequestration (b). It seems (c) that receivers are sometimes appointed to administer sequestered property. A receiver has been appointed by the Court of Chancery on the application of a divorced wife who had obtained an order for maintenance (d); but though a judge of the Chancery or King's Bench Divisions may have jurisdiction to make such an order under section 25 (8) of the Judicature Act, 1873, in view of the peculiar jurisdiction of the Divorce court to enforce its own orders (e), it is submitted that the application ought to be made to a judge of the Probate and Divorce Division, and that a receiver would not normally be appointed by any other court: for "the only remedy for disobedience to an order for non-payment of alimony is that pointed out by section 52 of 20 and 21 Vict. c. 85" (f). After the death of a co-respondent (g) or petitioner (h), the Divorce court has no jurisdiction to enforce an order for payment of damages or costs or *semble* arrears of alimony or maintenance, since the legal personal representative cannot be added (i); but after the death of a husband,

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(b) See p. 2. The practice laid down in R. S. C. Ord. 50, r. 16, is followed, see p. 182.

(c) Dixon on Divorce, p. 288, and *post*, p. 380.

(d) *Oliver v. Lowther*, 28 W. R. 381.

(e) See *Ivimey v. Ivimey*, [1908] 2 K. B. 260; *Robins v. Robins*, [1907] 2 K. B. 13.

(f) *Per Bowen, L.J.*, in *Bailey v. Bailey*, 13 Q. B. D., p. 860; see *Ivimey v. Ivimey*,

supra, at p. 265. S. 52 has been repealed by the Statute Law Revision Act, 1892, the statutory jurisdiction of the rules taking its place.

(g) *Brydges v. Brydges*, [1909] P. 187.

(h) *Re Coleman*, [1920] P. 71; as to proof against estate, *Re Stillwell, infra*.

(i) *Ib.*; *quaere Waddell v. Waddell*, [1892] P. 226.

Chap. II. the wife can prove against his estate for arrears of alimony
Sect. 5. and, *semble*, a divorced wife for arrears of maintenance (*k*):
as a *quasi* creditor, she can therefore sue for administration
and a receiver in a proper case.

Where a judgment debtor was entitled as one of the next-of-kin of a deceased intestate, to whom administration had not been taken out, to a share of the personal estate of the deceased, it was held that a judgment creditor was entitled to have a receiver appointed over the share (*l*).

The judgment creditor of a corporation, whose debt originated prior to the Municipal Corporations Act, 1835, was held entitled to have a receiver appointed over the whole corporate property, including land that might have been acquired since the Act (*m*).

The same principle which prevents the assignee of part of a judgment debt from issuing execution at law, namely, because the assignor can only issue execution for the whole debt and cannot put the assignee in any better position than himself (*n*), applies to prevent such assignee from obtaining a receiver by way of equitable execution (*o*).

A creditor who has obtained an order for payment of costs, and has endeavoured to obtain a sequestration, but has failed to do so from the conduct of the debtor, is

(*k*) *Re Stillwell*, [1916] 1 Ch. S. C. 25 L. J. Ch. 776. The Act 365; *semble*, up to twelve years' of 1835 was repealed by the arrears could be recovered under Municipal Corporations Act, s. 8 of the Real Property 1882.
Limitation Act, 1874.

(*l*) *Mullane v. Aherne*, 28 2 K. B. 636.
L. R. Ir. 105.

(*m*) *Arnold v. Mayor of* [1920] 2 K. B. 243.
Gravesend, 2 K. & J. 574;

(*n*) *Forster v. Baker*, [1910]

(*o*) See *Rothschild v. Fisher*,

entitled to apply for a receiver in lieu of sequestration (p). Chap. II.
Sect. 5.
 So also a judgment for the payment of money into court may be enforced by the appointment of a receiver, where service of the writ of attachment cannot be effected (q).

By virtue of section 23 (2) of the Partnership Act, 1890 (r), the High Court or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

By sub-section (4) of the same 23rd section it is provided that the section shall apply in the case of a cost-book company, as if the company were a partnership within the meaning of the Act ; and by section 7 of the Limited Partnerships Act, 1907 (7 Ed. 7, c. 24), section 23 (2) of the Act of 1890 applies to a limited partnership.

By R. S. C. Ord. 46, r. 1A, every summons under this section is to be served, in the case of a partnership other than a cost-book company, on the judgment debtor

(p) *Bryant v. Bull*, 10 Ch. D. 153. *Coney v. Bennett*, 29 Ch. D. 993 ; *Re Pemberton*, [1907] W. N.

(q) *Stanger Leathes v. Stanger Leathes* (1882), W. N. 71 ; 118. (r) 53 & 54 Vict. c. 39.

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and on his partners or such of them as are within the jurisdiction, or, in the case of a cost-book company, on the judgment debtor and the purser of the company.

The summons is supported by an affidavit which need not, as in the case of an ordinary debtor, state that the defendant has no other property available for execution, and usually asks for a named receiver in addition to a charging order: if it apprehended that the debtor may deal with his interest an injunction should be applied for *ex parte* on affidavit. The smallness of the amount due constitutes no objection to the order (s).

The section has been held to apply to a foreign firm having a branch house in England (t).

A charging order under the section does not make the judgment creditor of the partner a secured creditor under the Bankruptcy Act, 1914 (u). Nor, it is conceived, would an order appointing a receiver have that effect (x).

The court will not necessarily refuse to appoint a receiver until the amount of the applicant's debt has been ascertained. Therefore, where an action by a married woman was dismissed with costs to be paid out of her separate property, and the only separate property of the plaintiff consisted of a share under a will which the trustees were about to pay over to the plaintiff, the court appointed a receiver to receive the share before the costs had been taxed (y).

(s) See *Summers v. Simpson*, unrep., cited Annual Practice (n) to Ord. 46, r. 1A.

(t) *Brown, Janson & Co. v. Hutchinson & Co.*, [1895] 1 Q. B. 737. See the judgment of Lindley, L.J., for some valuable observations on the effect of appointing a receiver under the

section.

(u) *Wild v. Southwood*, [1897] 1 Q. B. 317.

(x) See p. 197 as to effect of charging order on money in receiver's hands.

(y) *Cummins v. Perkins*, [1899] 1 Ch. 16.

The powers of equitable execution should not be exercised except in cases where the judgment debt is sufficiently large to justify this expensive procedure, and the property sought to be charged in execution is not only of a fitting character, but likely to satisfy a reasonable proportion of the debt. In some cases the plaintiff has been appointed receiver, without security, to receive property largely in excess of his judgment debt, subjecting the defendant to serious prejudice and loss. In other cases, receivership orders have been granted over contingent and reversionary interests, whereas the sounder practice would have been to grant orders over that class of property by way of charge only, so as to avoid costs being incurred in settling security, &c., for what is at the moment, if granted, a mere dry receivership (z). The following rule of court has accordingly been made, for the purpose of limiting the cases in which a receiver can be appointed. "In every case in which an application is made for the appointment of a receiver by way of equitable execution, the court or a judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment (a).

The practice on appointment is dealt with in Chapter V.

If there are prior or outstanding mortgages, but the mortgagees are not in possession, or refuse to take

(z) The appointment will not be made at all if it will certainly prove ineffective: *Harper v. M'Intyre*, 51 S. J. 701.
 (a) R. S. C. Ord. 50, r. 15A; *Anon.* (1884), W. N. 63.

Chap. II. possession, the court will appoint a receiver of the mort-
 Sect. 5. gaged premises at the suit of judgment creditors, without prejudice, however, to the right of mortgagees to take possession, if they think fit (*b*), and the defendant will be ordered to deliver up possession to such receiver (*c*). A judgment creditor, who has obtained equitable execution subject to existing incumbrances, obtains no priority by giving notice to the trustees of the debtor (*d*).

Courts of Bankruptcy have jurisdiction to appoint a receiver by way of equitable execution, for the purpose of enforcing orders for the payment of money to the trustee in bankruptcy (*e*). But such an order will not, as a general rule, be made upon an *ex parte* application (*f*).

The Court of Bankruptcy may, if it is necessary for the protection of the estate, at any time after the presentation of a petition and before a receiving order is made, appoint the official receiver *interim* receiver of the property of the debtor or any part of it (*g*).

Equitable
creditors.

In favour of equitable creditors the court will appoint a receiver over property against which legal creditors might obtain execution. If a legal creditor has the right to take an estate in execution, there is no principle on which it can be held that an equitable creditor has not a right to equitable execution (*h*). The case of equitable

(*b*) *Rhodes v. Mostyn*, 17 Jur. 1007; see *supra*, p. 40.

(*c*) *Cadogan v. Lyric Theatre*, [1894] 3 Ch. 338, where the passage in the text was cited by Lord Herschell, L.C.

(*d*) *Arden v. Arden*, 29 Ch. D. 702; and see *Re Ind, Coope & Co.*, [1911] 2 Ch. 223.

(*e*) *Re Goudie*, [1896] 2 Q. B. 481.

(*f*) *Ib.*

(*g*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 8; for practice, Bankruptcy Rules, 1915, rr. 160-5. The official receiver acts till a trustee is appointed, s. 74 (1). As to power to appoint a manager, s. 10.

(*h*) 2 Swa. 132; 2 Wms. C. R. 150.

incumbrancers is dealt with in the preceding section. Chap. II.
There may, however, be cases in which an equitable creditor may not be an incumbrancer in the ordinary sense of the word, but he may have a right to be paid out of a particular fund or a right to the protection of certain property. The court will not appoint a receiver at the suit of an equitable creditor without an enforceable charge, however clear his claim may be, unless it is satisfied that the property is in danger, or unless there be some other equity upon which to found the application. In a case where a testator had devised his estate to a man for life without impeachment of waste "except voluntary waste in pulling down houses and not rebuilding the same, or others of equal or greater degree," the tenant for life pulled down the mansion-house with the intention of forthwith building a better one on the site, and was proceeding with all reasonable despatch to carry such intention into effect; and it was contended that he was an equitable debtor for the value of the house pulled down, by virtue of the obligation imposed on him by the will to rebuild. There being no pretence for saying that he was not proceeding to fulfil his obligation, the party entitled to the next vested remainder was held not entitled to have a receiver of the rents appointed, in order to secure the rebuilding of the mansion (*i*).

In appointing a receiver in aid of a legal judgment for a legal debt, the Court of Chancery, it has been very commonly said, granted equitable execution. But the expression is not correct (*k*). The appointment of a receiver is not execution, but is equitable relief granted

(*i*) *Micklewaite v. Micklewaite*, 2 K. B. 183, *Re A. Company*,
1 De G. & J. 504. [1915] 1 Ch. p. 526.

(*k*) *Morgan v. Hart*, [1914]

Chap. II. under circumstances which make it right that legal
Sect. 5. difficulties should be removed out of the creditor's way.

What a judgment creditor gets by the appointment of a receiver is not execution, but equitable relief which is granted on the ground that there is no remedy by execution at law: it is a taking out of the way a hindrance which prevents execution at law (*l*).

This distinction between equitable relief and execution is of importance, because the creditor who applies to have a receiver appointed stands in many respects in a very different position from a creditor who issues execution (*m*). Thus, an order cannot be made appointing a receiver by way of equitable execution after the death of the judgment debtor, even though he was alive when the application was first made (*n*), for this would amount to preferring one creditor of a deceased person to another (*o*); and the executors of a deceased judgment creditor are not entitled to apply for a receiver under R. S. C. Ord. 42, r. 23, because this does not amount to asking for leave to issue execution within that rule (*p*).

(*l*) *Re Shephard*, 43 Ch. D. 131, 135; *Levasseur v. Mason & Barry*, [1891] 2 Q. B. 79. See, too, *Re Marquis of Anglesey*, [1903] 2 Ch. 727, at p. 731; *Thompson v. Gill*, [1903] 1 K. B. 760, at p. 765; *Re Bond*, [1911] 2 K. B. 988.

(*m*) See, further, *post*, p. 216.

(*n*) *Re Shephard*, 43 Ch. D. 131.

(*o*) *Re Cave* (1892), W. N. 142. The appointment of a receiver in *Re Waddell*, [1892] P. 226, over the estate of a dead co-respondent at the instance of

a petitioner in a divorce suit to enforce payment of costs, appears to have been made without jurisdiction, as the suit had lapsed by the death and there was no power to add the legal personal representatives (*Brydges v. Brydges*, [1909] P. 187; *Coleman v. Coleman*, [1920] P. 71).

(*p*) *Norburn v. Norburn* [1894] 1 Q. B. 448. It appears that the proper course is for the executors to apply to be added as parties under Ord. 17, r. 4.

If the application is in respect of a judgment debt within the protection of the Courts Emergency Powers Acts (q) no special application is necessary before issuing the summons, but it must be served on the debtor with a notice in or to the effect of the form in the schedule to the Courts (Emergency Powers) Rules (r). Chap. II.
Sect. 5.

Courts
Emer-
gency
Powers
Acts.

The effect of the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), is that a decret of the Court of Session in Scotland is, when a certificate of it has been registered under that Act, to be treated as if it had been originally an English judgment; and, therefore, the appointment of a receiver by way of equitable execution may be made upon such a certificate (s).

SECTION 6.—IN THE CASE OF COMPANIES (t).

(A) *Statutory Companies.*

Where a mortgage has been made by a railway, canal, or other statutory company of its "undertaking," or the rates, tolls, and dues arising therefrom, the mortgagee may, for the protection of his security, come to the court for a receiver (u). Sect. 6.

(q) Debts due under contracts entered into prior to 4th August, 1914, are within the Acts: see the Acts and Rules in Annual Practice.

(r) Rule 4 (9).

(s) *Thompson v. Gill*, [1903] 1 K. B. 760, 771.

(t) As to companies incorporated under the Companies (Consolidation) Act, 1908, and analogous Statutes, see pp. 75 *et seq.*

(u) *Fripp v. Chard Railway Co.*, 11 Ha. 241; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 146; *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 541; *Gardner v. London, Chatham and Dover Railway Co.*, L. R. 2 Ch. 201; *Blaker v. Hertf and Essex Waterworks Co.*, 41 Ch. D. 399; see, as to form of order, Seton, 7th ed., p. 736; *Postlethwaite v. Maryport Harbour*

Chap. II. So a mortgagee of turnpike (*x*), dock (*y*), or market (*z*)
 Sect. 6. tolls, has a right to come to the court to have a receiver
 appointed. And a man who has sold land to a statutory
 company in consideration of a rentcharge may come to
 the court for a receiver (*a*).

The court has jurisdiction to appoint a receiver at the instance of a mortgagee of tolls, independently of any Act of Parliament (*b*). The appointment of a receiver at the instance of a mortgagee of tolls is one of the oldest remedies of the court (*c*). It is not necessary, in such a case, that there should be an Act giving the court power to appoint a receiver: When an Act of Parliament authorises a mortgage, it authorises, as incidental to it, all necessary remedies to compel payment, and in the case of tolls a power to appoint a receiver (*d*). But no mortgage or assignment by a company incorporated by statute for a specific purpose with statutory privileges and obligations is valid except to the extent and in the manner permitted by Parliament (*e*).

The fact that a precise and specific remedy may be

Trustees (1869), W. N. 37. A railway mortgage debenture holder is entitled to a receiver of the tolls of the undertaking, and not merely of the profits. The order for the appointment of a receiver should follow the terms of the mortgage deed as to the property in respect of which the appointment is made: *Griffin v. Bishop's Castle Railway Co.*, 15 W. R. 1058.

(*x*) *Knapp v. Williams*, 4 Ves. 430 n., per Lord Loughborough; *Lord Crewe v. Edleston*, 1 D. & J. 109,

(*y*) *Ames v. Birkenhead Docks*, 20 Beav. 342.

(*z*) *De Winton v. Mayor of Brecon*, 26 Beav. 533.

(*a*) *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14, 488.

(*b*) *De Winton v. Mayor of Brecon*, *supra*.

(*c*) *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447.

(*d*) *De Winton v. Mayor of Brecon*, *supra*, at p. 541.

(*e*) See *Re Woking U. D. C. (Basingstoke Canal) Act*, 1911; [1914] 1 Ch. 300.

pointed out by the Act of incorporation, which provides Chap. II.
Sect. 6. that persons aggrieved by any order of the managers of the corporate body may appeal to the quarter sessions, does not deprive a party of his right to a receiver; nor does a proviso in the Act of incorporation, that no action shall be commenced against any person for anything done in pursuance of the Act, until a certain notice has been given, apply to an action for a receiver (*f*), nor does a proviso in the Act of incorporation of a railway company, that a committee of twelve of the proprietors of the company shall be elected at every annual meeting to manage the affairs of the company, deprive a mortgagee of his right to a receiver of the rates, tolls, and dues of the company (*g*). Nor is the jurisdiction to appoint a receiver at the suit of a mortgagee taken away by the fact that there is a provision by statute for the appointment of a receiver through the medium of two justices of the peace (*h*). Nor is it any objection to the appointment of a receiver that the company has duties to perform, the neglect of which might subject it to indictment; for the order of the court always gives the parties liberty to apply, whereby such consequences may be averted (*i*).

The court will appoint a receiver at the instance of mortgagees or debenture holders of a company formed for the conduct of a public undertaking (*k*), when the

(*f*) *Drewry v. Barnes*, 3 Russ. 104.

(*g*) *Fripp v. Chard Railway Co.*, 11 Ha. 241.

(*h*) *Ib.* 259. By the Companies Clauses Consolidation Act, 1845, ss. 53, 54, provision is made for the appointment of a receiver at the suit of mortgagees by two justices of the peace. A pro-

vision to the same effect is contained in 10 & 11 Vict. c. 16, ss. 86, 87.

(*i*) *Fripp v. Chard Railway Co.*, 11 Ha. 259.

(*k*) As to what companies fall within this category, see *Re Crystal Palace Co.*, 104 L. T. 898; *affd. sub nom. Saunders v. Bevan*, 28 Times L. Rep. 518. As

Chap. II.
Sect. 6. interest is in arrear (*l*), or when the principal is in arrear, although all interest has been paid (*m*). But where the interest is not in arrear, a statutory debenture stockholder, who is an annuitant with no enforceable charge, cannot maintain an action to restrain the company from making an application of its money which is *intra vires*; though there may be cases in which the court will interfere to restrain acts manifestly to his injury (*n*). A mortgagee has in certain cases a right to come to the court to protect his security, though there is neither principal nor interest in arrear (*o*). It must, however, be borne in mind that the court will not appoint a manager of the undertaking of a public company, except in cases where the appointment is specifically authorised by statute, as, for instance, cases within section 4 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127 (*p*)).

In a case where a mortgagee of turnpike tolls under an Act of Parliament, which provided that there should be no priority between mortgagees, took possession upon not being paid and retained the whole proceeds in discharge of his own demand, a receiver was appointed (*q*).

Pleading. A mortgagee of the tolls of a company, seeking to obtain

to the powers of such a receiver, see *Carmichael v. Greenock Harbour Trustees*, [1910] A. C. 274.

(*l*) *Bissill v. Bradford Tramways Co.* (1891), W. N. 51. For form of appointment over undertaking of a gas and water company, see *Re Ticehurst Gas and Water Co.*, 128 L. T. Jo. 516.

(*m*) *Hopkins v. Worcester and Birmingham Canal Co.*, 6 Eq. 447.

(*n*) *Lawrence v. West Somerset*

Mineral Railway Co., [1918] 2 Ch. 250; see *Yorkshire Railway Waggon Co. v. Macture*, 21 Ch. D. p. 314; *Re Liskeard and Caradon Railway*, [1903] 2 Ch. pp. 686, 687.

(*o*) *Wildy v. Mid Hants Railway Co.*, 16 W. R. 409, and cases cited, note (*n*).

(*p*) See *infra*, pp. 68-75.

(*q*) *Dumville v. Ashbrooke*, 3 Russ. 99 (*n*).

the appointment of a receiver, must sue on behalf of himself and all other mortgagees who have an interest identical with his own, or are in the same class with himself (*r*). A receiver may be appointed in a suit instituted by one of several mortgagees on behalf of himself and all others, though the others do not concur in the application (*s*).

The court will not, at the suit of mortgagees, sanction the appointment of a receiver of a public company, established by the Legislature for a particular object, without providing as far as possible for the future working and continuance of the undertaking sanctioned by the Legislature (*t*). The order will also be without prejudice to the rights of prior incumbrancers.

Even after a receiver of the tolls had been appointed, the Court of Chancery appointed a receiver of the chattel property of a railway company on a motion by a debenture holder, when the company had by a deed assigned its rolling stock and chattels to trustees for the general benefit of creditors (*u*).

An ordinary judgment creditor of a railway or canal company has a right, as between himself and the company, to go into possession of the land, and, not interfering with the working of the railway or canal, to take the

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Provisions
inserted in
the order.

Receiver
of chattels
of a rail-
way com-
pany.

Judgment
creditor of
a company
may have
a receiver.

(*r*) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; *Fripp v. Chard Railway Co.*, 11 Ha. 241; *Hope v. Croydon Tramways Co.*, 34 Ch. D. 730.

(*s*) *Fripp v. Chard Railway Co.*, 11 Ha. 241.

(*t*) *Ib.*, at p. 265; *Potts v. Warwick and Birmingham Canal Co.*,

Kay, 147; *Ames v. Birkenhead Docks*, 20 Beav. 350; see, as to the form of the order, *Fripp v. Chard Railway Co.*, 11 Ha. 265; Seton, 7th ed., pp. 736, 755; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 143.

(*u*) *Waterlow v. Sharp* (1867), W. N. 64.

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profits realised by its use in the only way in which the responsibilities imposed by the legislature on such companies for the benefit of the public allow them to use it, and in the assertion of that right to have the protection of a Court of Equity, by the appointment of a receiver of the tolls and traffic receipts (*x*).

When the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, the court will not appoint a receiver before judgment has been obtained in the action, even though the company admit liability (*y*).

Where a receiver is already in possession, another receiver will not be appointed on the application of another judgment creditor (*z*). But the court may appoint the existing receiver to be receiver of all the property of the company not included in the previous order for the appointment of a receiver (*a*).

Priorities
between
mortgagee
and
judgment
creditor.

As between a judgment creditor and a mortgagee of the undertaking, who had obtained his mortgage before the recovery of the judgment, the right of the mortgagee is paramount (*b*). Accordingly, when a receiver has been appointed at the instance of a mortgagee, his right is prior to the claim of a judgment creditor under an *elegit*, whose whole interest in the land can be that only which

(*x*) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 145; *Imperial Mercantile Credit Association v. Newry and Armagh Railway Co., &c.*, Ir. L. R. 2 Eq. 531, per Christian, L.J.; *Kingston v. Cowbridge Railway Co.*, 41 L. J. Ch. 152.

(*y*) *Latimer v. Aylesbury and Buckingham Railway Co.*, 9

Ch. D. 385.

(*z*) *Re Mersey Railway Co.*, 37 Ch. D. 610.

(*a*) *Hope v. Croydon Tramways Co.*, 34 Ch. D. 730.

(*b*) *Legg v. Matthieson*, 2 Giff. 71; *Wildy v. Mid Hants Railway Co.*, 16 W. R. 409; and see p. 66.

subsists subject to the right of the receiver and the provisions of the Railway Acts. Notwithstanding that a receiver may have been appointed at the instance of a mortgagee, a judgment creditor may also have a receiver appointed; but the receiver who has been appointed at the instance of a judgment creditor takes without prejudice to the right of a receiver appointed at the instance of a mortgagee (c). The fact that judgment may have been obtained before the appointment of a receiver at the instance of the mortgagee does not vary the rule. If the mortgagee is not in possession by his receiver at the time when execution is issued, the judgment creditor may take the rates and tolls then due; but, as to the rates and tolls thereafter to become due, he will be stopped at any time by the mortgagee entering into possession by his receiver (d).

In a case in which a judgment creditor applied for a receiver against a company which had concluded an agreement with another company to work its line, a receiver was appointed without prejudice to the working agreement (e).

(c) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 145; *Ames v. Birkenhead Docks*, 20 Beav. 332; *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447. In a case where a judgment creditor under an *elegit* was in possession, and a receiver was afterwards appointed at the suit of a mortgagee, it was ordered that notice of the order should be given to the judgment creditor, and that he should be at liberty, though not a party to the cause, to appear at the hearing of the

motion, or to give such notice of motion to discharge or vary the order as he might be advised. *De Winton v. Mayor, &c., of Brecon*, 26 Beav. 539.

(d) See *Ames v. Birkenhead Docks*, 20 Beav. 332, at pp. 348, 352, referring to provisions of the Common Law Procedure Act, 1854, which have been repealed by the Statute Law Revision Act, 1883, and are replaced by R. S. C. Ord. 45.

(e) *Contract Corporation v. Tottenham and Hampstead Junction Railway Co.*, 1868, W. N. 242.

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In determining the respective rights of a mortgagee of a railway, canal, or other undertaking, and a judgment creditor, it is necessary to bear in mind that the effect of a mortgage of a company's undertaking and tolls in accordance with the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), is to carry the tolls, the unpaid calls, and probably all the property of the company, as proprietors of the undertaking, which any one is at liberty to use on paying toll. No specific charge is created on the rolling stock, or on the proceeds of any sold in the course of the company's business, nor on surplus lands of the company nor their proceeds, for it is contemplated that the company will dispose of these in the course of its business. Such a mortgage creates an actual charge on only the tolls and sums of money arising or authorised to be received by virtue of the company's special Act and the Act of 1845, *i.e.*, the profits arising from the use of the undertaking as a going concern (*f*). But where the company obtains statutory authority to sell its rolling stock in bulk, the debentures constitute such a charge on the proceeds as to entitle the debenture holders to payment thereout in priority to judgment creditors (*g*): and the same would appear to be the case with the land on which the undertaking is carried on, the debenture constituting a charge in the nature of a floating charge till the property is disposed of (*h*). According to these principles where a railway company, being indebted

(*f*) *Gardner v. London, Chat-* 116.

ham and Dover Railway Co.,
infra; and see *Attree v. Hawe*,
9 Ch. D. 337; and see *Hart v.*
Eastern Union Railway Co., 7
Exch. 265; *Eastern Union*
Railway Co. v. Hart., 8 Exch.

(*g*) *Re Liskeard and Caradon*
Railway, [1903] 2 Ch. 681; see
Yorks. Wagon Co. v. Maclure,
21 Ch. D. p. 314.

(*h*) See *Legg v. Matthieson*,
2 Giff. 71.

to contractors for work done, had granted to them, as a security for the debt, a specific charge upon the moneys to arise from the sale of the company's surplus lands, it was held that the holders of mortgage debentures of the company, made in the form given in Schedule C to the above Act of 1845, had no charge upon those lands or the proceeds of the sale of them, but that the assignees of the contractors were entitled to have a receiver of those proceeds appointed (i). In an earlier case it had been held that the mortgagee of the tolls arising from a company's undertaking could not have an injunction and receiver against judgment creditors who were about to take under an *elegit* the lands of the company (k). A mortgage of a railway company's undertaking includes, it is conceived, the interest of the company in the works, rails, and fixtures as incident to the working of the railway (l). A judgment creditor has been restrained, at the instance of a mortgagee, from taking under his *elegit* the works, rails, &c., incidental to the working of the railway (m). But a mortgagee with a specific charge on the proceeds of sale of lands sold by the company (not on the lands themselves); was held not entitled to a charge on the proceeds of a sale effected by judgment creditors (n).

A company, incorporated by statute, although it has exhausted its borrowing power in creating mortgages of its undertaking, may still create a valid security for an

(i) *Gardner v. London, Chatham, and Dover Railway Co.*, L. R. 2 Ch. 201.

(k) *Perkins v. Deptford Pier Co.*, 13 Sim. 277.

(l) *Legg v. Matthieson*, 2 Giff. 71; see *Gardner v. London, Chatham, and Dover Railway Co.*,

L. R. 2 Ch. 201.

(m) *Legg v. Matthieson*, 2 Giff. 71; see now *Railway Companies Act, 1867*, *infra*.

(n) *Wickham v. New Brunswick, &c., Railway Co.*, L. R. 1 P. C. 64.

Chap. II. existing debt over all its property that may be taken
Sect. 6. in execution: and such security will be valid if given to mortgagees who are pressing for payment. A judgment creditor will not therefore be allowed to levy execution on surplus lands or chattels which are included in the security and of which a receiver is in possession (o).

Right of
 judgment
 creditor
 to the
 chattels of
 a com-
 pany.
 30 & 31
 Vict. c.
 127, s. 34;
 38 & 39
 Vict. c. 31.

Formerly, under an *elegit*, the chattels and rolling stock of a railway company might, it is conceived, have been seized by a judgment creditor of the company (p). Now, however, the 4th section of the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, made perpetual by 38 & 39 Vict. c. 31, protects the plant and rolling stock of a railway company from being taken in execution (q); but a person who has recovered judgment against a railway company for a sum of money may obtain the appointment of a receiver, and also, if necessary, of a manager of the undertaking of the company, on application by

(o) *Stagg v. Medway Upper Navigation Co.*, [1903] 1 Ch. 169; *Reeve v. Medway Upper Navigation Co.*, 21 T. L. R. 400.

(p) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125; *Bowen v. Brecon Railway Co.*, 3 Eq. 548; *Blackmore v. Yates*, L. R. 2 Ex. 225.

(q) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645. The rolling stock and plant of a railway company, whose railway has once been opened for traffic, are protected from being taken in execution even when the traffic on the railway has ceased, in consequence of the railway being in need of exten-

sive repairs and there is no probability that the traffic will be resumed. *Midland Wagon Co. v. Potteries, Shrewsbury and North Wales Railway Co.*, 29 W. R. 78. Where there is in fact no undertaking, as, for instance, where the railway has not been commenced, the Act does not apply, and no receiver will be appointed. *Re Birmingham and Litchfield Junction Railway Co.*, 11 Ch. D. 155. So, also, where it appeared that the undertaking was being worked at a loss, a receiver was not appointed. *Re Waterford, &c., Railway Co.*, 5 L. R. Ir. 584.

petition in a summary way to the Chancery Division (r); Chap. II. and the section further provides that "all money Sect. 6. received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking (s), be applied and distributed under the direction of the court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and, on payment of the amount due to every such judgment creditor as aforesaid, the court may, if it think fit, discharge such receiver or such receiver and manager."

A judgment creditor of a railway company who obtains a receivership order under section 4 of the Act of 1867 does not thereby obtain priority over other creditors (t).

In a case in which, after a receiver of the undertaking of a railway company had been appointed under the above 4th section, the company's rolling stock and other chattels were sold to another company under an agreement, confirmed by statute, which directed the purchasing company to pay the purchase-money to the receiver, it was held that the purchase-money constituted money received by the receiver within the meaning of the section; and, further, that the holders of mortgage debentures charging the undertaking of the railway company were entitled, by virtue of section 23 of the

(r) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645; see also *Re Beddgelert Railway Co.*, 19 W. R. 427. Applications under the Act are regulated by rules contained in Part II. of an Order of Court, dated the 24th January, 1868, and printed

in L. R. 3 Ch. at p. xlii.

(s) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645; *Re Mersey Railway Co.*, 37 Ch. D. 610; *Re Eastern and Midlands Railway Co.*, 45 Ch. D. 367.

(t) *Re Mersey Railway Co.*, 37 Ch. D. 610.

Chap. II. same Act of 1867, to a fund representing that money, in
 Sect. 6. priority to unsecured creditors (*u*).

In *Re Wrexham, Mold, and Connah's Quay Railway Co.* (*x*), it was held by the Court of Appeal that costs incurred by the railway company, subsequently to the appointment of a receiver under section 4, in defending an action by a contractor in relation to the construction of the company's line, were not "working expenses of the railway," or "other proper outgoings," within the meaning of the section, but still, having been incurred for the benefit of the debenture holders and other creditors of the company, were payable in priority to any future payments by the receiver to the debenture holders.

The 4th section of the Act of 1867, though prohibiting execution against the rolling stock of a railway company, does not interfere with the right of a creditor who has recovered judgment against a railway company to apply under section 36 of the Companies Clauses Consolidation Act, 1845, for leave to issue execution against a shareholder of the company who has been appointed receiver, to the extent of any moneys remaining due in respect of his share (*y*).

Where a railway company, which had granted a right of easement over its line to another railway company in consideration of a rent, had recovered judgment against the last-mentioned company for arrears of rent, it was held that a receiver of the tolls of the defendant company, appointed at the instance of the holders of its debenture

(*u*) *Re Liskeard and Caradon* receiver.
Railway Co., [1903] 2 Ch. 681.

(*x*) [1900] 1 Ch. 261.

In this case the decision stated
 in the text was given upon
 a petition presented by the

(*y*) *Re West Lancashire Rail-
 way Co.* (1890), W. N. 165; 63
 L. T. 56.

stock, must pay the rent, as being part of the "working expenses of the railway" within the meaning of the above section 4, before making any payment to the holders of debenture stock (z).

The appointment of a receiver is the only remedy open to the holders of mortgage debentures of a railway: the right to foreclosure or sale is denied to them (a): but a judgment creditor of a railway company may, under and in accordance with the provisions of the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4, as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), have an order for the sale of superfluous lands of the railway company (b).

The position of a statutory bond holder of a company governed by the Companies Clauses Acts must be carefully distinguished from the position of a mortgagee. A statutory bond holder is not entitled to an equitable charge on the tolls and traffic receipts of the undertaking, or to have a receiver appointed over such tolls and receipts, for the purpose of paying his claim (c). In *Russell v. East Anglian Railway Co.* (d), where a receiver had been appointed by consent at the suit of a bond holder of a rail-

(z) *Great Eastern Railway Co. v. East London Railway Co.*, 44 L. T. 903.

(a) *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399. This principle also applies to the holders of debentures of a tramway company governed by the Tramways Act, 1870. *Marshall v. South Staffordshire Tramways Co.*, [1895] 2 Ch. 36.

(b) See *Re Bishops Waltham Railway Co.*, L. R. 2 Ch. 382, 384; *Gardner v. L. C. & D. Ry. Co.*, L. R. 2 Ch. App. 201; *Ex*

parte Grissell, ib. 385; *Re Calne Railway Co.*, L. R. 9 Eq. 658; *Re Ogilvie*, L. R. 7 Ch. 174; *Re Hull, Barnsley, &c., Railway Co.*, 40 Ch. D. 119, 120; *Stagg v. Medway (Upper) Navigation Co.*, [1903] 1 Ch. 169, at p. 174.

(c) *Imperial Mercantile Credit Association v. Newry and Armagh Railway Co., &c.*, Ir. L. R. 2 Eq. 524; see *Lawrence v. West Somerset Railway Co.*, [1918] 2 Ch. 681.

(d) 3 Mac. & G. 151.

Chap. II.
Sect. 6.

way company, Lord Truro held that the order for a receiver ought not to have been made, and permitted the execution creditor to levy under his writ of *fi. fa.*, against the goods of the company, notwithstanding the possession of the receiver (e); and there can be no doubt that if the judgment creditor had in that case asked leave to issue an *elegit* against the land of the railway, as well as a *fi. fa.*, the reasoning on which he was held entitled to the one would as well have entitled him to the other (f).

Receiver
appointed
at
instance
of statu-
tory bond
holder.

A statutory bond or debenture holder, who has obtained judgment and execution against the company, may bring an action on behalf of himself and all other bond holders for a receiver (g), but he is not bound to bring his action in that form. A statutory bond or debenture holder, who has recovered judgment and issued execution against the company, is not a trustee of the moneys he may recover under the execution for himself and all other bond or debenture holders. If he gets paid by the company under his execution before any of the other holders intervene or come into competition with him, he may keep what he has got (h). The proper mode of giving effect to the provisions with respect to non-priority as between bond holders which are contained in the Companies Clauses Consolidation Act, 1845, is conceived to be to let them operate after the bond holders come into competition with each other, but not so as to undo past transactions. The priority spoken of in the 44th section of that Act is not a priority existing by virtue of some or one of the bonds,

(e) See *Bowen v. Brecon Railway*, L. R. 3 Eq. 548.

(f) *Imperial Mercantile Credit Association v. Newry and Armagh Railway, &c.*, Ir. L. R. 2 Eq. 539, *per* Christian, L.J.

(g) *Ib.* 526, *per* Christian, L.J.

(h) *Ib.* 543; see, too, *Fountain v. Carmarthen Railway Co.*, L. R. 5 Eq. 324, *per* Lord Hatherley.

but a priority to be acquired by execution ; in other words, Chap. II.
a priority not as between bonds which are not charges Sect. 6.
at all, but as between executions (i).

The 42nd section of the Companies Clauses Consolidation Act, 1845, limits and diminishes the intrinsic rights of mortgagees, imposing on them the principle of non-priority (k). After an action has been brought by a mortgage debenture holder suing on behalf of himself and all other the mortgage debenture holders, against a company governed by that Act, and a receiver has been appointed, a single mortgage debenture holder, who has recovered judgment against the company on his debenture, is not entitled to issue execution on his judgment otherwise than as a trustee for himself and all other mortgage debenture holders entitled to be paid *pari passu* with himself (l). The intent of the Act being that parity of possession shall be given to those who have parity of security, one mortgage debenture holder is not entitled, as soon as he can recover judgment, to acquire an advantage for himself over the other mortgage debenture holders (m). Accordingly, where a receiver had been appointed in a suit instituted on behalf of all the mortgage debenture holders of a railway company, and a judgment was afterwards recovered against the company by one of the mortgage debenture holders, an inquiry was directed whether it would be for the benefit of the debenture holders generally that any proceedings should be taken by the receiver for the purpose of making the judgment available for them (n).

Under Companies Clauses Act of 1845 mortgagees cannot have priority as against each other.

(i) See Ir. L. R. 2 Eq. 543, *Co.*, L. R. 3 Eq. 541.
per Christian, L. J. (m) *Ib.* 550.

(k) Ir. L. R. 2 Eq. 534, *per* (n) *Ib.* 551 ; see, too, *Hope*
Christian, L. J. *v. Croydon Tramways Co.*, 34

(l) *Bowen v. Brecon Railway* Ch. D. 730.

Chap. II. By the Mortgage Debenture Act, 1865 (28 & 29 Vict.
 Sect. 6. c. 78), ss. 41, 42, 44, 45, 46, and 47, as amended by the
 Mortgage Debenture Mortgage Debenture Act, 1870 (33 & 34 Vict. c. 20),
 Acts. on default in payment of interest, or principal money,
 due on a mortgage debenture issued by a company under
 those Acts, application may be made to the Chancery
 Division of the High Court for the appointment of a
 receiver, and the court may appoint a receiver to act on
 behalf of the applicant and the other persons entitled
 to the company's mortgage debentures. Statutory
 companies may now issue redeemable debenture
 stock (o).

Priority of mort- The priority of mortgagees and bond and debenture
 gagees and stock holders of a railway company against the company,
 bond and the property from time to time of the company, over
 holders all other claims on account of any debts incurred or
 under engagements entered into by the company after the 20th
 30 & 31 August, 1867, was declared by the 23rd section of the
 Vict. c. Railway Companies Act, 1867 (30 & 31 Vict. c. 127) (p).
 127. That section, however, provides that this priority shall
 not affect any claim against the company in respect of
 any rent-charge granted or to be granted by the com-
 pany in pursuance of the Lands Clauses Consolidation
 Act, 1845, or the Lands Clauses Consolidation Acts
 Amendment Act, 1860, or in respect of any rent or sum,
 reserved by or payable under any lease granted or made
 to the company by any person in pursuance of any
 Act relating to the company, which is entitled to
 rank in priority to, or *pari passu* with, the interest

(o) See Statutory Companies *way Co.*, 48 L. T. 41; *Re*
 Redeemable Stock Act, 1915. *Eastern and Midlands Railway*
 (p) *Re Cornwall Minerals Rail-* *Co.*, 45 Ch. D. 367.

on the company's mortgages, bonds, or debenture stock (q). Chap. II.
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In the case of mortgages created before August 4th, 1914, during the currency of the Courts Emergency Powers Acts (r), it is necessary to obtain the leave of the court before instituting proceedings for foreclosure or sale, but where the only remedy of the mortgagee as debenture holder is to procure appointment of a receiver, by the court, it seems that no leave is required; since the appointment of a receiver by the court is not within the acts, and no proceedings for foreclosure or realisation are instituted (s). Courts
Emer-
gency
Powers
Acts.

(B) *Companies Incorporated under the Companies Acts.*

The appointment of a receiver over the undertaking and assets of a limited company may be made upon the application of a mortgagee with a specific charge, or of a holder of a debenture or debenture stock, who is an equitable mortgagee with a floating charge (t). In the former case

(q) Moreover, the section does not give to a company's debenture holders any lien or charge entitling them to priority of payment out of the proceeds of surplus lands of the company which have been sold on the application of judgment creditors: *Re Hull, Barnsley, &c. Railway Co.*, 40 Ch. D. 119.

(r) See Annual Practice for rules and practice on application.

(s) See *Re Farnol Eades, Irvine & Co.*, [1915] 1 Ch. 22: it seems that the provisions of s. 1 (1) (a) of the Courts Emergency Powers

Act, 1916 (No. 2), only refer to an appointment by the mortgagee.

(t) Though a debenture stock holder, as a rule, has no direct contract with the company, and is not therefore a creditor who can petition (*Re Dunderland Iron Ore Co., Ltd.*, [1909] 1 Ch. 446), he is entitled as *cestui que trust* to the benefit of the trust deed, and can therefore sue for a receiver if the trustees do not (see *Empress Engineering Co.*, 16 Ch. D. 125).

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the ordinary considerations applicable to mortgagees apply: in the latter the jurisdiction of the court is now well settled (*u*).

A receiver will be appointed at the instance of a debenture holder or holder of debenture stock, that is of an incumbrancer with a floating charge (*x*) in the following cases:—

1. When the principal is in arrear (*y*), or when the interest is in arrear, even though in accordance with the terms of the debenture, the principal has not thereby been rendered payable (*z*), or when any other event has happened by which, under the terms of the debenture, the security has become enforceable. It is sufficient if the principal has become due at the date of the application, though it was not in arrear when the writ was issued (*a*).

2. When the security has crystallised into a specific charge by reason of a winding-up order or resolution, and that though the winding up is for purposes of reconstruction or amalgamation, and the debenture specifically provides that the security is to be enforceable in the case

(*u*) The jurisdiction was exercised by the Court of Chancery, see *Perry v. Oriental Hotels Co.*, 5 Ch. 420; *Hopkins v. Worcester, &c. Canal*, 6 Eq. 437.

(*x*) If the debenture is a mere bond without a charge, there is no security, and the remedy is by personal judgment against the company for payment only: a receiver can only be obtained by way of equitable execution to enforce the judgment over property amenable to that remedy.

(*y*) Even if no interest is in

arrear, see *Hopkins v. Worcester, &c. Canal Co.*, 6 Eq. 437.

(*z*) *Strong v. Carlyle Press*, [1893] 1 Ch. 268; as to power to issue irredeemable debentures see s. 103, and to re-issue debentures, s. 104, Companies (Consolidation) Act, 1908. See *Bissill v. Bradford Tramways Co.*, (1891) W. N. 51.

(*a*) *Hodson v. Tea Co.*, 14 Ch. D. 859; *Wallace v. Universal Co.*, [1894] 2 Ch. 547; *Re Victoria Steamboats*, [1897] 1 Ch. 158; *Re Carshalton Park Estate*, [1908] 2 Ch. 62.

of a winding up "otherwise than for purposes of reconstruction or amalgamation; since it is a characteristic of a floating security that it crystallises into a specific charge when the company has become incapable of carrying on its business, and an equitable incumbrancer with a specific charge is entitled to a receiver (b). Chap. II.
Sect. 6.

3. Where the security is in jeopardy (c), as, for instance, where creditors are pressing and a winding up is imminent (d), or where the company's funds and credit are exhausted and creditors are threatening (e), or where the company is threatening to dispose of its whole undertaking (f), or to distribute among shareholders a reserve fund which is its sole asset (g). But the mere fact that the security is for the time being insufficient is not of itself enough to establish a case of jeopardy where no creditors are pressing (h); and where the debenture holders had a specific charge which was sufficient to answer their claim, as well as a floating charge, the appointment was limited to the property specifically charged, though a case of jeopardy was made out (i).

(b) *Re Crompton & Co., Ltd.*, [1914] 1 Ch. 954. a state of suspended animation (club of enemy members) see

(c) *Macmahon v. North Kent Co.*, [1891] 2 Ch. 148; *Edwards v. Standard Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Thorn v. Nine Reefs*, 67 L. T. 93; *Re Victoria Steamboats*, [1897] 1 Ch. 158; and cases *infra*, nn. *Higginson v. German Athenæum, Ltd.*, 32 Times Rep. 277.

(p) to (u). (f) *Hubbuck v. Helms*, 56 L. J. Ch. 536; but not where only one of several businesses is to be disposed of, see *Foster v. Borax Co.*, [1899] 2 Ch. 130.

(d) *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576. (g) *Re Tilt Core Copper Co., Ltd.*, [1913] 2 Ch. 588.

(e) *Re Braunstein and Marjolaine*, [1914] W. N. 335. For a (h) *Re New York Taxicab Co., Ltd.*, [1913] 1 Ch. 1.

case where a receiver was appointed against a company in (i) *Gregson v. George Taplin & Co.*, 112 L. T. 985.

Chap. II. Where there is no properly constituted governing body
 Sect. 6. of a joint stock company, it has been held that the court
 Receiver appointed may in exceptional circumstances interfere by appointing
 of property of joint a receiver, until a meeting can be called for the purpose of
 stock com- appointing a governing body (*k*).
 pany until The memorandum almost invariably confers an express
 meeting of power to mortgage the undertaking, but even in the
 company. absence of an express power a commercial or trading
 Validity company has an implied power to borrow on security (*m*),
 of Debenture (*l*). and such a power may be implied in other companies as
 incidental to the purposes for which they were formed.
 Uncalled capital may be charged, but only under an
 express power to do so (*n*). A mortgage or charge, unless
 within 21 days after creation particulars are registered
 pursuant to section 93 of the Companies (Consolidation)
 Act, 1908, is void against the liquidator and creditors, so
 far as it purports to effect a security (*o*). A floating charge
 created within three months of the commencement of a
 winding up is invalid, except to the extent to which it is
 security for money advanced at the time or subse-
 quently (*p*). The right of debenture holders whose
 security has crystallised or become enforceable is absolute

(*k*) *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 298; see *534; Newton v. Debenture Holders of Anglo-Australian, &c. Co.*, [1895] A. C. 244.

Seton, 694, 754: or the court might, semble, itself call a meeting, see *Macdougall v. Gardiner*, 10 Ch. 606. (o) And even against a subsequent mortgagee with notice, *Re Monolithic Building Co., Ltd.*, [1915] 1 Ch. 643.

(*l*) See generally Palmer Comp. Prec., vol. iii. c. 9.

(*m*) See *Re Badger*, [1905] 1 Ch. p. 573; *Re Patent File Co.*, 6 Ch. 83.

(*n*) *Re Pyle Works*, 44 Ch. D.

(*p*) S. 212 Companies (Consolidation) Act, 1908; see *Re Hayman, Christy and Lillie, Ltd.*, [1917] 1 Ch. 283; see *Re Orleans Motor Co.*, [1911] 2 Ch. 41.

and does not rest in the discretion of the court (*q*) ; thus a receiver will be appointed though a liquidator has before been appointed (*r*) ; in such a case it is a usual practice to appoint the liquidator receiver (*s*). And although, where the appointment is asked for on the ground of jeopardy, the court has a discretion, yet if a case of real jeopardy is made out the application cannot be refused (*t*). Chap. II.
Sect. 6.

The decision of the question whether the principal is in arrear depends upon the terms of the debentures : where no place is fixed for payment it is the duty of the company to seek the debenture holder and tender the money (*u*) : but where payment is to be made at the company's office there is no default unless the debenture holder attends and gives the company an opportunity to pay (*x*). Where the principal is payable on demand at a certain place, but there is no such provision as to interest, and the company makes default in payment of interest, the principal becomes due though no demand is made at the specified place (*y*). If the covenant is to pay on or before a date fixed, the effect is to make the money payable on that day with an option to the company to pay on an earlier date (*z*) : if the covenant is to pay on or after a date fixed the money becomes payable on or after that date on demand by the

(*q*) See *Strong v. Carlyle Press, Ltd.*, [1893] 1 Ch. 268 ; *Re Crompton and Co., Ltd.*, [1914] 1 Ch. 954 ; *Willmot v. London Celluloid Co.*, 52 L. T. 642, and *ante*, p. 37.

(*r*) *Strong v. Carlyle Press, Ltd.*, *supra*.

(*s*) See p. 152, *post*.

(*t*) See *Re London Pressed Hinge Co.*, [1905] 1 Ch. 576.

(*u*) *Fowler v. Midland Electric Corporation*, [1917] 1 Ch. 656.

(*x*) *Re Escalera Silver Lead Mining Co.*, 25 Times Rep. 87.

(*y*) *Re Harris Calculating Machine Co.*, [1914] 1 Ch. 920.

(*z*) *Re Tewkesbury Gas Co.*, [1911] 2 Ch. 279 ; *affd.*, [1912] 1 Ch. 1 ; see also *Central Printing Works v. Walker*, 24 Times Rep. 88.

Chap. II. covenantee (a). A provision that a covenant to pay is
 Sect. 6. only to be enforced at the option of the covenantor is void for repugnancy (b); but where there is no covenant to pay, but stock is made redeemable at the option of the covenantor, there is no obligation to pay until the covenantor had assumed it (c).

Where receiver appointed by debenture holders. The fact that debenture holders have, under a power contained in the debentures appointed their own receiver does not preclude the court from appointing its own receiver in a proper case (d).

The holder of a floating security cannot enforce his claim to any specific item of property over which the charge exists until the security has crystallised (e). A receiver should be asked for over the whole of the property to which the charge extends.

If the charge extends to the goodwill, as it usually does in the case of debentures, the receiver will also be appointed manager: this topic is fully dealt with in Chapter XIII. The debenture holder may, however, elect whether he will have a receiver simply, who would be unable to fulfil the company's contracts, and so destroy the goodwill, besides rendering the company liable in damages, or a receiver and manager whose duty it would be to carry out contracts (f). It is submitted that if debenture holders of a prior series elect for a receiver only, being satisfied that the assets apart from the goodwill are

(a) *Re Tewkesbury Gas Co.*,
supra.

(b) *Watling v. Lewis*, [1911] 1 Ch. 414; *Re Tewkesbury Gas Co.*, [1911] 2 Ch. p. 285.

(c) See *Edinburgh Corporation v. British Linen Bank*, [1913] A. C. 133.

(d) *Re Slogger Automatic Feeder Co., Ltd.*, [1915] 1 Ch. 478, see *post*, p. 155.

(e) *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

(f) See *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468.

sufficient to pay them in full, or if they have no charge on the goodwill the receiver would be appointed manager on the application of subsequent incumbrancers whose security includes the goodwill, where this can be effected without damage to the prior incumbrancers (*g*). In similar circumstances it appears that the only remedy of unsecured creditors would be to obtain a winding-up order and apply to have the liquidator appointed manager.

A person who obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such receiver or manager under the powers of any instrument, must within seven days give notice to the registrar of companies, who thereupon enters the fact on the register of mortgagees (*h*). Chap. II.
Sect. .
Appointment of
receiver
must be
regis-
tered.

During the currency of the Courts Emergency Powers Acts the leave of the court is necessary before instituting proceedings to enforce debentures or mortgages created before August 4th, 1914 (*i*).

SECTION 7.—IN CASES BETWEEN VENDOR AND PURCHASER.

The court will, upon a proper case being made out, interfere upon motion, and appoint a receiver, in cases between vendor and purchaser. Accordingly, where, on a bill impeaching a sale of land on the ground of fraud, and alleging gross inadequacy of consideration and undue influence taken of the ignorance of the vendor, the court was of opinion, from the materials before it, Sect. 7.

(*g*) *Ib.*

(*h*) Companies (Cons.) Act, 1908 (8 Edw. 7, c. 69), s. 94.

(*i*) See *ante*, p. 75; and for rules and practice on application see Annual Practice.

K.R.

6

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Sect. 7.

that it was hardly possible the transaction could stand at the hearing, a receiver was appointed in a suit instituted against the devisees of the party charged with fraud (*k*). So, also, where it appeared that the defendants had obtained the conveyance of the legal estate from the plaintiff upon a strong suspicion of abused confidence, a receiver was appointed (*l*).

In *George v. Evans* (*m*), where a bill was filed by a *cestui que trust* to set aside a purchase by a trustee from him, a motion for the appointment of a receiver was refused, although the trustee admitted the purchase of the trust property; the ground of the decision being that, though the case was one of suspicion, the court could not interfere until the purchase-deed was actually set aside, no clear evidence having been given to show that the property was likely to perish from the neglect or misconduct of the defendant. But in a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent representation, it being essential that the mine should be kept going, the court upon the application of the purchaser appointed a receiver and manager until the hearing (*n*).

If a fair *prima facie* case for the specific performance of a contract is made to appear, the court may interfere upon motion and appoint a receiver (*o*). Accordingly, where a bill alleged that the defendant had taken possession, that he was insolvent, and that he had attempted to sell and convey the estate in question, a receiver was

(*k*) *Stillwell v. Wilkins*, Jac. 282.

(*l*) *Huguenin v. Basiley*, 13 Ves. 107.

(*m*) 4 Y. & C. 211.

(*n*) *Gibbs v. David*, L. R. 20 Eq. 373.

(*o*) See *Kennedy v. Lee*, 3 Mer. 448; *M'Cloud v. Phelps*, 2 Jur. 962.

appointed (*p*). So, where an agreement was entered into by the defendant for the sale of an estate to A., the purchase to be completed and the purchase-money to be paid on or before the expiration of five years, and in the meantime interest to be paid half-yearly by A., with power to the defendant to avoid the contract in the event of the interest being in arrear for twenty-one days; and the defendant afterwards virtually agreed with the plaintiff, who had advanced money to A. in order to enable him to pay arrears of interest, to extend the term for payment of the half-yearly interest, but notwithstanding the agreement re-entered as for a forfeiture, the court, upon a bill for specific performance, appointed a receiver (*q*). So, also, on the application of the unpaid vendor of land to a railway company, a receiver was appointed (*r*). And it is submitted that a receiver would be appointed against a vendor, who had been paid the whole of his purchase-money, but remained in possession and refused to execute a conveyance. Again, a receiver was appointed, on the vendor's motion, pending a reference to the Master as to title in a suit for the specific performance of a contract for the sale of an estate, which consisted of buildings and offices on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention (*s*). So, also, a receiver may be appointed against a purchaser in possession, who deals with the land in a manner contrary to former usage, or to

(*p*) *Hall v. Jenkinson*, 2 V. & B. 125. and *Buckingham Railway Co.*, 21 W. R. 819; *Ware v. Aylesbury and Buckingham Railway Co.*, ib.

(*q*) *Dawson v. Yates*, 1 Beav. 301.

(*r*) *Munns v. Isle of Wight Railway Co.*, L. R. 5 Ch. 414; see, too, *Williams v. Aylesbury* : (*s*) *Boehm v. Wood*, 2 J. & W. 236.

Chap. II. the usual course of husbandry, at the instance of the vendor
 Sect. 7. and before judgment for specific performance (t) ; or in
 the case of leaseholds if he makes default and the vendor
 is obliged to pay rent to avoid forfeiture (u). Where,
 pending a suit instituted by a married woman against
 her husband, praying for the execution of a post-nuptial
 settlement and for an injunction to restrain him from
 selling or incumbering, the husband sold the estate com-
 prised in the settlement to the plaintiffs for valuable
 consideration, and the plaintiffs thereupon filed a bill,
 alleging that the settlement was void against them as
 being voluntary, charging that the defendant was taking
 advantage of the legal estate to prevent the purchaser
 proceeding at law, and praying, amongst other things,
 for a receiver ; the court being satisfied upon the pleadings,
 that the decree would be in favour of the plaintiffs, and
 that the contract would be enforced, granted the motion
 for a receiver (x). So, also, in an action to enforce specific
 performance of a parol agreement to execute a bill of sale
 of personal chattels, the court, being satisfied that there
 was evidence of immediate danger to the chattels,
 appointed a receiver (y).

In a case where a purchaser was discharged on a report
 that a good title could not be made out, and there was
 no fund in court to pay him his interest and costs, a
 receiver was appointed over the lands, with directions
 to apply the rents in discharge of his interest and
 costs (z).

(t) *Osborne v. Harvey*, 1 Y. & V. & B. 181.
 C. C. C. 116.

(y) *Taylor v. Eckersley*, 2

(u) *Cook v. Andrews*, [1897] Ch. D. 302 ; 5 Ch. D. 741.
 1 Ch. 266.

(z) *Hill v. Kirwan*, 1 Hog.

(x) *Metcalfe v. Pulvertoft*, 1 175.

A receiver may be appointed under special circumstances before the order for sale has been made absolute (a). Chap. 11.
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In an action for specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff appealed, and the Court of Appeal appointed the plaintiff receiver and manager of the farm without security, as he was afraid that he might be prejudiced if he took possession without the order of the court. And as he would only have to incur expenditure, he was not required to give security (b).

SECTION 8.—IN CASES BETWEEN COVENANTOR AND COVENANTEE.

The court will interfere in cases between covenantor and covenantee, and appoint a receiver, where a fair *prima facie* case is made out for the specific performance of the covenant. In a case, for instance, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to repay it after the death or failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession refused to perform his covenant, the court, on bill for specific performance, appointed a receiver of the rents (c). So, where the defendant, upon an advance of money being made to him, had agreed to execute a

(a) *Re Stafford*, 31 L. R. Ir. 309.

195.

(c) *Free v. Hind*, 2 Sim. 7,

(b) *Hyde v. Warden*, 1 Ex. D,

Chap. II. mortgage of certain lands, but afterwards refused to
 Sect. 8. perform his agreement, and there was an arrear of interest due on the money advanced, on bill for specific performance the motion for a receiver was granted (*d*). So also where, in a case which arose between the years 1811—1817 (when the incumbent of a benefice might charge his benefice), an incumbent duly charged his benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would charge the same with an annuity to the same amount; but afterwards, on being preferred to another benefice, he refused to fulfil his covenant; the court held that the covenant constituted a good equitable charge, which attached on the new benefice, and granted a receiver (*e*).

The court will interfere, when necessary, to prevent irreparable mischief from breach of covenant, although the property may have to be distributed in bankruptcy, and though the Court of Bankruptcy may be able to give the same relief (*f*).

SECTION 9.—IN CASES BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

Sect. 9. If a tenant for life does not keep down the interest of mortgages, and other incumbrances on the estate, the remainderman may apply to have a receiver appointed, with power to keep down the interest, remitting to the tenant for life the surplus rents (*g*).

(*d*) *Shakel v. Duke of Marlborough*, 4 Madd. 463. Ch. 821.

(*e*) *Metcalf v. Archbishop of York*, 6 Sim. 225; 1 M. & C. 579; *Bertie v. Lord Abingdon*, 3 Mer. 560; *Shore v. Shore*, 4

(*f*) *Riches v. Owen*, L. R. 3 Drew. 501.

Whether, as against a legal tenant for life of renewable leaseholds, the court will appoint a receiver for the purpose of providing renewal fines, will primarily, it is conceived, depend upon whether the tenant for life is or is not, by the terms of the will or settlement, under an obligation to renew. If he is, his conduct may be such as to justify the appointment; but if he is not, it is conceived that the court will decline to interfere (*h*).

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Where leasehold houses are vested in trustees on behalf of a tenant for life and remainderman, and the tenant for life is allowed by the trustees to receive the rents but does not keep the houses in a proper state of repair according to the covenants in the lease, the court will at the instance of the trustees appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses (*i*).

Where a testator devised his estates to A. B. for life without impeachment of waste, "except voluntary waste in pulling down houses and not rebuilding the same or others of equal or greater value," and A. B. pulled down the mansion-house with the intention of building a better on the site, and was proceeding with all reasonable despatch to carry that intention into effect, it was held that the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the rebuilding of the mansion (*j*).

Where there was a limitation of a term to raise portions for younger children, and subject thereto the estate was limited to A. B. for life, with remainder over,

(*h*) See *per* Turner, L.J., in 225, at p. 233.
Micklethwait v. Micklethwait, 1 (*i*) *Re Fowler*, 16 Ch. D. 723.
 De G. & J. 504, at pp. 511, 530; (*j*) *Micklethwait v. Mickle-*
 and Bennett *v. Colley*, 2 M. & K. *thwait*, 1 De G. & J. 504.

Chap. II. and a decree had been made to sell the term for raising
 Sect. 9. portions, but A. B. would not produce the title-deeds, so
 that it was impossible to make out the title and proceed
 to a sale, an order was made for the appointment of a
 receiver of the rents and profits of the estate (*k*).

Where a business had been carried on during the lives
 of two tenants for life by a receiver, and there had been a
 loss during the life of the first tenant for life, but a profit
 during the life of the second tenant for life, it was held that
 the loss should be made good out of the subsequent profits
 and not out of capital (*l*).

SECTION 10.—IN PARTNERSHIP CASES.

Sect. 10. Where an application is made for a receiver in partner-
 ship cases, the court is always placed in a position of
 Principles very great difficulty: on the one hand, if it grants the
 on which a receiver is ap- motion, the effect of it is to put an end to the partner-
 pointed. ship, which one of the parties claims a right to have
 continued; and, on the other hand, if it refuses the
 motion, it leaves the defendant at liberty to go on with
 the partnership business at the risk, and probably to
 the great loss and prejudice, of the dissenting party.
 Between these difficulties it is not very easy to select the
 course which is best to be taken, but the court is under
 the necessity of adopting some mode of proceeding to
 protect, according to the best view it can take of the
 matter, the interests of both parties (*m*).

(*k*) *Brigstock v. Mansel*, 3 Beav. 500; per Lord Langdale;
 Madd. 47. see, too, *Blakeney v. Dufaur*, 15

(*l*) *Upton v. Brown*, 26 Ch. D. Beav. 42; *Sargant v. Read*, 1
 588. Ch. D. 600.

(*m*) *Madgwick v. Wimple*, 6

In granting or refusing an order for a receiver in partnership cases, the court does not act on the same principles on which it grants or refuses an order for an injunction. In granting a receiver of a partnership, the court takes the affairs of the partnership out of the hands of all the partners, and entrusts them to a receiver or manager of its own appointment : in granting an injunction, the court does not take the affairs of the partnership into its own hands, but only restrains one or more of the partners from doing what may be complained of. The order for a receiver excludes all the partners from taking any part in the management of the concern ; the order for an injunction merely restrains one of the partners who may have acted in breach of the partnership articles, or may have otherwise misconducted himself, from continuing to act in the way complained of (*n*). It therefore does not follow that because the court will grant an injunction, it will also appoint a receiver, or that because it refuses to appoint a receiver, it will also decline to interfere by injunction (*o*). In every case where complaints are made of breaches of partnership articles, it must be seen whether the complaints are urged with a view of making them the foundation of a dissolution, or of a judgment enforcing and carrying on the partnership according to the original terms, and preventing, by proper means, the recurrence of those breaches which have before happened by reason of the conduct of one of the parties (*p*).

(*n*) See *Hall v. Hall*, 3 Mac. & G. at p. 86. although an injunction was granted, a receiver was refused.

(*o*) See *Hartz v. Schrader*, 8 Ves. 317 ; *Hall v. Hall*, 12 Beav. 414, 3 Mac. & G. 79, where, (*p*) *Hall v. Hall*, 3 Mac. & G. 79, at p. 87.

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Receiver
not ap-
pointed
unless a
dissolu-
tion be
sought.

It is not according to the practice of the court, where the object of the action is not to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, to grant, in the course of that action, the appointment of a receiver and manager (*q*). The court does not interfere for the management of a partnership, except as incidental to the object of the action, to wind up the concern and divide the assets (*r*). If the court were not to adopt such a rule, it might be called upon to make itself the manager of every trade in the kingdom (*s*).

Cases, however, frequently arise in which a partner is so conducting himself that, unless a manager is appointed before the hearing, the partnership concern may in the meantime be destroyed. In such case the court will appoint an interim receiver and manager (*t*). A receiver would also, there is no reason to doubt, be appointed, although the dissolution of the partnership were not sought, in a case where the question was one of the receipt of money only, and where, if the money were allowed to be received by the parties, it would not be applied to its proper purposes, and thus at the trial there would be a failure of justice, unless the court interposed in the meantime (*u*). So, also, the court will appoint a receiver in the case of a dispute between partners, so as to secure the property until that dispute can be settled, although there is no claim for a dissolution (*x*).

- (*q*) *Goodman v. Whitcomb*, 1 *hardt*, Kay, 148.
J. & W. 589; *Hall v. Hall*, 3 (*t*) *Hall v. Hall*, 3 Mac. & G.
Mac. & G. 79; *Roberts v.* at p. 91.
Eberhardt, Kay, 148. (*u*) *Hall v. Hall*, 3 Mac. & G.
(*r*) *Waters v. Taylor*, 15 Ves. at p. 90.
13. (*x*) *Medwin v. Ditchman*
(*s*) *Goodman v. Whitcomb*, 1 (1882), W. N. 121; 47 L. T.
J. & W. 592; *Roberts v. Eber-* 250.

In *Const v. Harris* (y), Lord Eldon said that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to the terms of some specific instrument, which by the agreement of the parties was to regulate the mode of its being carried on, as well as in a suit for wholly putting an end to the concern; and a receiver was appointed in that case although a dissolution was not sought by the bill. The case itself was a peculiar one. The proprietors of a theatre had executed a deed by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits. Some years afterwards the parties entitled to seven-eighths of the theatre entered into an agreement which provided in some respects for a different application of the profits and otherwise affected the rights of a party interested in the remaining one-eighth, who was not consulted on the subject; and, upon the application of that party for the specific performance of the covenants and agreements of the original deed, a receiver was appointed. The receiver was a receiver wholly unconnected with the management. His office was purely a ministerial one. He was to receive all that persons paid for their entrance to the theatre, and to apply it according to certain terms and provisions which the parties themselves had agreed on (z).

It is not necessary, in order to induce the court to appoint a receiver, that the writ or statement of claim should expressly claim a dissolution. It is enough that it be plain that it is necessary to put an end to the

It is not necessary that the writ should claim a dissolution.

(y) T. & R. 517.

& G. 90.

(z) See *Hall v. Hall*, 3 Mac.

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concern (a). If such be the case, the case stands upon precisely the same basis as if the action had been brought exclusively for the purpose of the dissolution and the winding-up of the concern (b). The court will, in all cases, entertain an application for a receiver, if the object of the action is to wind up the partnership affairs, and the appointment of the receiver is sought with that view. Thus, in *Sheppard v. Oxenford* (c), a bill was filed by a shareholder in the National Brazilian Mining Company, on behalf of himself and other shareholders, against the defendant, its sole director and manager, praying for an account of moneys received and paid by the directors on behalf of the association, and of its debts, and the payment thereof out of the assets of the company, and for a division of the profits among the shareholders. The bill also prayed for an injunction to restrain the defendant from selling the property, and for a receiver to get in the debts owing to the company, and all remittances made to it from abroad, and generally to conduct the business and affairs of the association, until the accounts should be taken. No dissolution was expressly asked for, but the whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities; and on a motion by the plaintiff for an injunction and a receiver, an injunction was granted, and a receiver and manager was appointed as prayed by the bill. The defendant, who had gone out to Brazil after the bill had been filed, was appointed receiver and manager out there (d).

(a) *Wallworth v. Holt*, 4 M. & C. 619.

(c) 1 K. & J. 491.

(b) *Hall v. Hall*, 3 Mac. & G.

(d) *Sheppard v. Oxenford* at p. 501.

Again, in *Evans v. Coventry* (e), the members of two societies, or rather, it would seem, of one society having two branches of business, viz., a loan branch and an insurance branch, filed a bill for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up, if necessary, and their assets in the meantime protected by the appointment of a receiver and manager. It was proved that some of the funds had already been made away with by the secretary; and a receiver and manager was appointed by the Court of Appeal to protect what remained until the hearing of the cause, upon the ground that the plaintiffs had an interest in the funds in question, and that the funds were in danger of being lost. It does not appear very distinctly what the receiver and manager was expected to do in his capacity of manager. The Vice-Chancellor had refused the motion mainly on the ground that he could not take upon himself the management of such societies even until the hearing of the cause. The Court of Appeal did not allude to this.

The mere fact that the plaintiff in a partnership action may claim a dissolution is not a sufficient ground for the appointment of a receiver, unless such a state of facts is shown as will, if proved at the trial, entitle the plaintiff to a judgment for dissolution (f). The court will not, upon motion, appoint a receiver, unless it sees that there is an actual present dissolution arising from the acts of the parties, or foresees that at the trial it will dissolve the partnership. If there has been neither misconduct, nor

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The mere fact that the plaintiff claims a dissolution is not enough, unless there be a case for dissolution.

(e) 5 D. M. & G. 911, reversing J. & W. 589; *Smith v. Jeyes*, 4 B. & W. 503; *Roberts v. Eberhardt*, 3 Drew. 75.
(f) *Goodman v. Whitcomb*, 1 Kay, 148.

Chap. II. any such violation of the articles as to entitle the plaintiff
 Sect. 10. to a dissolution, a receiver will not be appointed (*g*). If, however, the court sees its way to a dissolution at the trial, there is a case for a receiver (*h*).

If the case made stands in such a state that the court cannot see whether there will or will not be a judgment for dissolution at the trial, "it will not take into its own hands the conduct of a partnership, which only may be dissolved" (*i*).

If the partnership is a continuing one and may continue, a receiver will not be appointed. If partners agree upon a term for the partnership to continue, neither partner can dissolve the partnership until the end of the term. But if there be misconduct, the court can and will appoint a receiver before the expiration of the term, and will make the appointment on an interlocutory application. But the case then made must not be one raising merely a question whether there is or is not misconduct as between the partners. The court must, especially if there be no term, see its way to a dissolution at the trial (*k*). The question whether there is or is not a term is a question properly determinable at the trial, and is not one that the court will try on an interlocutory application. If there is not sufficient evidence to enable the court upon the interlocutory application to say that at the trial it will appear there was a term, a receiver will not be appointed (*l*).

(*g*) *Baxter v. West*, 28 L. J. Ch. 169; see *Bailey v. Ford*, 13 Ch. 169.

(*h*) *Marsden v. Kaye*, 30 L. T. L. T. N. S. 43.

(*i*) *Goodman v. Whitcomb*, 1 Ch. 169; see S. C. at the hearing J. & W. at p. 592.

(*k*) *Baxter v. West*, 28 L. J.

(*l*) *Baxter v. West*, 28 L. J. Ch. 169; see S. C. at the hearing 1 Dr. & Sm. 175.

Where a partnership is dissolved by the issue of the writ, the mere fact of dissolution does not entitle the plaintiff as of right to the appointment of a receiver (*m*), although, if the partnership is already dissolved, the court usually appoints a receiver almost as a matter of course (*n*). Chap. II.
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The outbreak of war causes the dissolution of a partnership, one of the partners in which is an alien enemy (*o*), though the enemy partner is entitled to his share of profits made in winding up the business (*p*). In such cases a receiver will be appointed in an action in which the English partner is plaintiff (*q*); the alien enemy can be made defendant, but cannot be a plaintiff (*r*). An alien enemy can, however, be joined as a formal plaintiff in actions to recover debts due to the partnership (*s*). Alien
enemy
partner.

The court will not, as a matter of course, appoint a receiver of the partnership assets, even where a case for dissolution is made (*t*). The very basis of a partnership contract being the mutual confidence reposed in each other by the parties (*u*), the court will not appoint a receiver in an action between the members of a partnership firm, unless some special ground for its interference is established (*x*). It must appear that the member of Receiver
not
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a case for
dissolu-
tion is
made.

(*m*) *Pini v. Roncoroni*, [1892] 1 Ch. 633.

(*n*) *Ib.* at p. 637.

(*o*) See *Kupfer v. Kupfer*, [1915] W. N. 397.

(*p*) See *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartomagen Industrie*, [1918] A. C. 239; as to consideration, determining enemy character, *post*, p. 121.

(*q*) *Rombach v. Rombach*, [1910] W. N. 423.

(*r*) *Porter v. Freudenberg*, [1915] 1 K. B. 857.

(*s*) *Rodriguez v. Speyer Bros.*, [1919] A. C. 59.

(*t*) *Harding v. Glover*, 18 Ves. 281; *Fairburn v. Pearson*, 2 Mac. & G. 145.

(*u*) *Phillips v. Atkinson*, 2 Bro. C. C. 272; see, too, *Peacock v. Peacock*, 16 Ves. 51.

(*x*) *Harding v. Glover*, 18 Ves. 281.

Chap. II. the firm against whom the appointment of a receiver is
Sect. 10. sought has done acts which are inconsistent with the duty of a partner, and are of a nature to destroy the mutual confidence which ought to subsist between the parties (*y*).

A receiver may be appointed in an action for dissolution, notwithstanding a reference of disputes to arbitration (*z*), and the court will, by one and the same order, appoint a receiver and stay all proceedings in the action except for the purpose of carrying out the order for a receiver (*a*).

Where the value of the whole property stock and credits of the partnership does not exceed in value £500, the County Court can exercise all the powers and authority of the High Court in actions for dissolution or winding up (*b*).

A partnership formed to work metalliferous mines in Cornwall is a "company" within the meaning of that term in ss. 2 and 28 of the Stannaries Act, 1887, and is by s. 1 (2) of Partnership Act, 1890, excluded from the provisions of the latter Act; and by virtue of s. 1 of the Stannaries Court (Abolition) Act, 1896, and s. 131 (4) of the Companies (Cons.) Act, 1908, the County Court of Cornwall has exclusive jurisdiction to wind up such a partnership: and an application for a receiver should be made to that court (*c*).

Death or bank-
 ruptcy of one The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a

(*y*) *Smith v. Jeyes*, 4 Beav. 505.

(*z*) *Halsey v. Windham* (1882), W. N. 108; *Compagnie du Senegal v. Woods* (1883), W. N. 180; 53 L. J. Ch. 166.

(*a*) *Pini v. Roncoroni*, [1892] 1 Ch. 633.

(*b*) 51 & 52 Vict. c. 43, s. 67; as to transfers see ss. 68, 69.

(*c*) *Dunbar v. Harvey*, [1913] 2 Ch. 530.

receiver, as against the surviving or solvent partner or partners. The mutual confidence which the members of the firm reposed in each other at the date of the contract, and which formed the very basis of the partnership contract, is not, as regards the surviving or solvent partner or partners, affected by the death or solvency of one of the members of the firm (*d*). If a partner dies (*e*), or becomes bankrupt (*f*), a right to wind up the partnership concern and collect the assets is by law vested in the surviving (*g*), or solvent (*h*) partner or partners, as the case may be. Before the court will interfere and appoint a receiver, some breach or neglect of duty on their part must be established (*i*).

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member of
a firm not
a ground
for a
receiver.

If it is more convenient that the affairs of the partnership should be wound up in bankruptcy, the court will not appoint a receiver: thus, where one partner had died and the other had been adjudicated bankrupt, the court, on the application of the trustee in bankruptcy, discharged an order for a receiver made in a partnership action commenced by the executors of the dead partner, on proof that the solvency of the partnership and of the dead partner's estate was very doubtful (*k*).

(*d*) See *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*e*) *Collins v. Young*, 1 Macq. 385.

(*f*) *Fraser v. Kershaw*, 2 K. & J. 499.

(*g*) *Collins v. Young*, 1 Macq. 385.

(*h*) *Freeland v. Stansfield*, 2 Sm. & G. 487; *Fraser v. Kershaw*, 2 K. & J. 499.

(*i*) *Collins v. Young*, 1 Macq. 385; see *Baldwin v. Booth*

(1872), W. N. 229. The Probate Division will not appoint a receiver *pendente lite* against a surviving partner, unless under very special circumstances: *Horrell v. Witts*, L. R. 1 P. & M. 103.

(*k*) *Hulme v. Rowbotham*, [1907] W. N. 162, 189; most of the assets were situate in the jurisdiction of the County Court which was the tribunal in the bankruptcy proceedings.

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The reasoning on which the court proceeds, in refusing to appoint a receiver at the instance of one member of a firm against another, does not apply to the case of persons who acquire an interest in the partnership assets by events over which the parties have no control. If a member of a firm dies, or becomes bankrupt, the partnership is determined, as far as his personal representatives or trustee in bankruptcy are or is concerned. The personal representatives of a deceased partner are not strictly partners, nor is the trustee of a bankrupt partner strictly a partner, with the surviving or solvent partners or partner. They or he are or is only tenants or tenant in common with the surviving or solvent partners or partner to the extent of the interest which the deceased or bankrupt partner had in the partnership assets at the time of his death or bankruptcy, as the case may be (l). It is, consequently, a matter of course to appoint a receiver when all the partners are dead, and an action is pending between their representatives (m); or when such appointment is sought by a partner against the personal representatives or trustee in bankruptcy of his deceased or bankrupt co-partner (n). *Fraser v. Kershaw* (o) is a good illustration of the doctrine. There one partner had become bankrupt: the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to the judgment creditor by the sheriff. The creditor, as the assignee from the sheriff of the share and interest of the non-bankrupt partner,

(l) *Ex parte Williams*, 11 Ves. Bro. C. C. 272.

5, 6; *Wilson v. Greenwood*, 1 (n) *Freeland v. Stansfield*, 16 Sw. 480; *Fraser v. Kershaw*, 2 Jur. 792; 2 Sm. & G. 479.

K. & J. 499.

(o) 2 K. & J. 496.

(m) *Phillips v. Atkinson*, 2

claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But, on bill filed by the assignees in bankruptcy against the judgment creditor, the court granted an injunction and appointed a receiver, holding that the right of the non-bankrupt partner to wind up the affairs was personal to himself and not transferable, and, therefore, did not pass with his share and interest in the partnership assets (*p*).

The ground on which the court is most commonly asked to appoint a receiver is where, by the misconduct of a partner, his right of personal intervention in the partnership affairs has been forfeited, and the partnership funds are in danger of being lost. Mere quarrels and disagreements between the partners, arising from infirmities of temper, are not a sufficient ground for the interference of the court (*q*). The due winding-up of the affairs of the concern must be endangered, to induce the court to appoint a receiver (*r*). The non-co-operation of one partner, whereby the whole responsibility of management is thrown on his co-partner, is not sufficient (*s*).

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Misconduct of partner a ground for a receiver.

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted; as, for example, if one partner colludes with the debtors of the

(*p*) For the procedure against partnership property for a partner's separate judgment debt, see the Partnership Act, 1890, s. 23, *supra*, p. 53.

(*q*) See *Goodman v. Whitcomb*, 1 J. & W. 593; *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 504.

(*r*) See *Goodman v. Whitcomb*, 1 J. & W. 593; *Smith v. Jeyes*, 4 Beav. 505.

(*s*) *Roberts v. Eberhardt*, Kay, 148; see, too, *Rowe v. Wood*, 2 J. & W. 556, where one partner declined to advance more money to work a mine.

Chap. II. firm, and allows them to delay paying their debts (*t*) ; or
 Sect. 10. if he is carrying on a separate trade on his own account with the partnership property (*u*), or if a surviving partner insists on carrying on the business and employing therein the assets of his deceased partner (*x*) ; or if, in the opinion of the court, a case has arisen for the interposition of the court to secure the estate of a deceased partner against loss (*y*) ; or if, the partnership property being abroad, one of the partners goes off in order to do what he likes with it (*z*) ; or if the persons having the control of the partnership assets have already made away with some of them (*a*) ; or if there has been such mismanagement as to endanger the whole concern (*b*) ; or if one of the partners has acted in a manner inconsistent with the duties and obligations which are implied in every partnership contract (*c*) ;—in all such cases a receiver will be appointed.

The unwillingness of the court to appoint a receiver at the suit of one member of a firm against another being based on the confidence originally reposed in each other by the parties, the ground of the rule has no longer any place if it appears that the confidence has been misplaced (*d*). Accordingly, where a defendant, by false

(*t*) *Estwick v. Conningsby*, 1 & G. 911.
 Vern. 118.

(*u*) *Harding v. Glover*, 18 Ves.
 281.

(*x*) *Madgwick v. Wimble*, 6
 Beav. 495.

(*y*) *Baldwin v. Booth* (1872),
 W. N. 229 ; *Young v. Buckett*, 30
 W. R. 511 ; 46 L. T. 269.

(*z*) *Sheppard v. Oxenford*, 1
 K. & J. 491.

(*a*) *Evans v. Coventry*, 5 D. M.

(*b*) See *De Tastet v. Bordieu*,
 cited 2 Bro. C. C. 272 ; *Jeffreys*
v. Smith, 1 J. & W. 298 ; *Hall*
v. Hall, 3 Mac. & G. 86 ; *Chaplin*
v. Young, 6 L. T. 97.

(*c*) *Smith v. Jeyes*, 4 Beav.
 505 ; *Young v. Buckett*, 30 W. R.
 511 ; 46 L. T. 269.

(*d*) See *Chapman v. Beach*, 1
 J. & W. 594 n.

and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards, on discovering the fraud, filed a bill praying that the partnership might be declared void and for a receiver, the court on motion ordered that a receiver should be appointed (e).

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There is a case for a receiver, even although there be no misconduct endangering the partnership assets, if one partner excludes another partner from the management of the partnership affairs (f). This doctrine is acted on where the defendant contends that the plaintiff is not a partner (g), or that he has no interest in the partnership assets (h).

In *Hale v. Hale* (i), where the defendant sought to exclude the plaintiff from all interest in the partnership assets, and relied on illegality as a defence to the suit, a receiver was appointed. In that case the plaintiff and defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution and the defendant thereupon denied the plaintiff's right to any account or relief

(e) See *Ex parte Broome*, 1 Rose, 69.

(f) See *Wilson v. Greenwood*, 1 Sw. 481; *Goodman v. Whitcomb*, 1 J. & W. 592; *Rowe v. Wood*, 2 J. & W. 558; *Const v. Harris*, T. & R. 525. A dissolution which takes place on the refusal of an appointee under a will to become a partner is not a dissolution arising from the exclusion of the appointee by the surviving partner, and therefore will not be a foundation for a

receiver: *Kershaw v. Matthews*, 2 Russ. 62.

(g) *Peacock v. Peacock*, 16 Ves. 49; *Blakeney v. Dufaur*, 15 Beav. 40.

(h) *Wilson v. Greenwood*, 1 Sw. 471, where the plaintiffs were the assignees of a bankrupt partner. See, too, *Clegg v. Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(i) 4 Beav. 369.

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whatever, on the ground, that he, being a spiritual person, was not competent by law to engage in any trading concern, and claimed the whole property himself. A receiver and manager was appointed, on the ground that the defendant insisted on a legal objection as destroying all right of his co-partner to a share in the profits, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of (*k*).

Inasmuch as the court will not appoint a receiver against a partner unless some special ground for doing so can be shown, it follows that, in the case of a firm consisting of three or four members, there is more difficulty in obtaining a receiver than in a firm consisting of two. For, the appointment of a receiver operating as an injunction against the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by injunction than by the appointment of a receiver (*l*).

Course of
court
where
the part-
nership is
denied.

Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question has been determined (*m*). But if a special case be made out, as, for instance, if it be shown that the assets are in danger, a receiver will be appointed although the partnership is denied (*n*).

(*k*) See also *Sheppard v. Oxenord*, 1 K. & J. 492, where a receiver was appointed, although the legality of the partnership was denied.

(*l*) See *Hall v. Hall*, 3 Mac. &

G. 79.

(*m*) *Peacock v. Peacock*, 16 Ves. 49; *Fairburn v. Pearson*, 2 Mac. & G. 144; *Tucker v. Prior* 31 Sol. J. 784.

(*n*) *Longbottom v. Woodhead*,

Another case, in which the court may be called upon to appoint a receiver, is where the partners have by agreement divested themselves more or less of their right to wind up the affairs of the concern. In *Davis v. Amer (o)*, for instance, the plaintiff and defendant, on dissolving partnership, appointed a third person to get in the assets of the partnership, and agreed not to interfere with him. After the agreement had been partially acted on, one of the partners died, and, disputes arising between the executors of the deceased partner and the surviving partner, the latter got in some of the debts of the firm in violation of the agreement. A bill having been filed by the executors of the deceased partner for an injunction and a receiver, the court on motion appointed a receiver, but declined to grant an injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary (*p*).

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Receiver appointed where partners have by agreement divested themselves of the right of winding-up.

The court has jurisdiction to appoint a receiver of a partnership business, with a view to selling the business as a going concern, notwithstanding that the partnership has expired in pursuance of a provision to that effect contained in the partnership deed (*q*).

Receiver appointed though partnership has expired.

Where partners have agreed to refer disputes to a foreign tribunal, the court will not appoint a receiver during the liquidation of the partnership affairs, unless it is shown that the rights of the partners cannot be sufficiently protected by the foreign tribunal (*r*).

Receiver pending action in foreign tribunal.

In cases of mining partnerships a receiver will be

Receiver of mining partnerships.

83 L. T. 423; 31 Sol. J. 796.

(*q*) *Taylor v. Neate*, 39 Ch. D.

(*o*) 3 Drew. 64.

538.

(*p*) See also *Turner v. Major*,
3 Giff. 442.

(*r*) *Law v. Garrett*, 8 Ch. D.

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Chap. II. appointed or refused upon the same principles as in
 Sect. 10. other cases of partnership. Accordingly, if a dissolution or winding-up is not sought, a receiver will not be appointed (s); but, where a dissolution or winding-up is sought, a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases (t), or if the partners cannot agree as to the proper mode of working the mines until they are sold (u).

In *Rowe v. Wood* (x) a receiver was refused, although one of the partners excluded the other from interfering in the concern; but the case was a peculiar one, for the partner complained of was not only a partner but also a mortgagee in possession, and his mortgage debt was unsatisfied. Again, in *Norway v. Rowe* (y), although the plaintiff had been excluded, a receiver of a mining concern was refused on the ground of his laches; for he had been excluded for some time, and had taken no steps to assert his rights until the mines proved profitable (z).

In *Rowlands v. Williams* (a), where one of the partners in a mining concern had become lunatic, the court would not appoint a manager to carry on the business, but ordered a sale, and appointed an interim manager only.

Form of
 order.

In cases where a receiver of partnership property is appointed, the order should direct the other partners and all other parties to deliver over to the receiver all

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| (s) <i>Roberts v. Eberhardt</i> , Kay, 148. | wall, see p. 96. |
| (t) <i>Ib.</i> ; <i>Sheppard v. Oxenford</i> , 1 K. & J. 491. | (x) 2 J. & W. 553.
(y) 19 Ves. 144, at pp. 158, 159. |
| (u) <i>Jefferys v. Smith</i> , 1 J. & W. 298; <i>Roberts v. Eberhardt</i> , Kay, 159; <i>Lees v. Jones</i> , 3 Jur. N. S. 954; as to mines in Corn- | (z) See <i>Clegg v. Edmondson</i> , 8 D. M. & G. 808.
(a) 30 Beav. 310. |

securities in their hands for such estate or property, and also the stock-in-trade and effects of the partnership, together with all books and papers relating thereto (b). The court may abstain from making an order for the delivery of partnership books and papers, if there is no necessity for it, and if it would occasion inconvenience (c).

By section 23 of the Partnership Act, 1890, a judgment creditor of a partner may obtain an order appointing a receiver of that partner's share of profits, and of any other moneys which may be coming to him in respect of the partnership (d).

SECTION 11.—IN CASES OF LUNACY.

In cases of lunacy the court has always exercised a jurisdiction to appoint a receiver though no action is pending (e), but under the present practice such an appointment by the Chancery Division is rarely, if ever, necessary (f).

It was held in an old case that a receiver of a lunatic's estate might be appointed, where it appeared that no person could be found who would act as committee of the estate, and give the necessary security, without being paid (g). So, also, a receiver would be appointed where the committee was infirm, or where the management of the estate was very onerous (h), or where the committee

(b) Seton, 7th ed., p. 728. 315.

(c) *Dacie v. John*, M'Clell. 206.

(f) See the Lunacy Act, 1890.

(d) See *supra*, p. 53; also *Brand v. Sandground*, 85 L. T. 517.

(g) *Ex parte Radcliffe*, 1 J. & W. 639.

(h) *Re Birch*, Shelf. on Lun. 187.

(e) *Ex parte Whitfield*, 2 Atk.

Chap. II. lived far from the estate (*i*). In one case where it was
 Sect. 11. thought expedient to appoint a receiver, and the person
 appointed as committee of the estate declined to act as
 committee if another person was appointed receiver, an
 inquiry was directed as to the propriety of employing the
 committee in the latter capacity (*k*).

Receivers
 under
 s. 116 of
 Lunacy
 Act, 1890.

Under the present practice committees are seldom
 appointed. By section 116 of the Lunacy Act, 1890 (53
 Vict. c. 5), the court in lunacy was authorised to appoint
 persons (usually called receivers, but more accurately
 described as *quasi* committees (*l*)) to exercise large powers
 of administration and management over the property of
 the following (*m*): (1) persons lawfully detained as
 lunatics, though not so found by inquisition (*n*); (2) per-
 sons incapable, through mental infirmity or disease, of
 managing their own affairs, though not detained as
 lunatics (*o*); (3) persons of unsound mind who are
 incapable of managing their affairs whose property
 does not exceed £2,000 in total value, or £100 in yearly
 income (*p*); (4) persons who are or have been criminal
 lunatics, and who continue insane and in confinement (*q*).

(*i*) *Re Seaman*, Shelf. on Lun.
 187.

(*k*) *Re Langham*, 1 Jur. 281.
 Where a committee was ap-
 pointed in addition to a receiver,
 it was usual to restrain the latter
 from receiving rents and profits :
 see *Re Billingham*, Amb. 104 ;
Ex parte Radcliffe, 1 J. & W. 639 ;
 1 Coop. C. C. 250 ; *Re Frank*, 2
 Russ. 450, at p. 451.

(*l*) *Re E. G.*, [1914] 1 Ch. 927.

(*m*) As to lunatics so found,
 see s. 108.

(*n*) Section 116 (1) c. This

sub-section was held to apply to
 persons detained in accordance
 with the Idiots Act, 1886: *Re*
Whalley, [1906] 1 Ch. 565 ; that
 Act has now been repealed
 by s. 67, Mental Deficiency
 Act, 1913, but by s. 64,
 Part IV. of the Lunacy Act,
 1890, applies to the administra-
 tion of the estate of defectives.

(*o*) Section 116 (1) d.

(*p*) Section 116 (1) e.

(*q*) Section 116 (1) f. The
 section does not apply to lunatics
 detained in foreign countries:

And by section 1 of the Lunacy Act, 1908 (8 Edw. 7, Chap. II. c. 47), the powers of management of the property of the Sect. 11. above persons are extended to include all powers which might be exercised by a committee of the estate of a lunatic so found by inquisition, whether derived under the Lunacy Acts or otherwise (r). As a result of this legislation it is rarely necessary to appoint a committee, as a receiver can do all that is required. He has, however, no powers over the person of the patient. Although the receiver cannot sell the lunatic's estate tail he can be authorised to sell the land so as to bar the estate tail (s).

The receiver is either appointed with plenary powers, in which case further applications to the Master, except as regards passing of accounts, are as a rule unnecessary, or with restricted powers (t). Remuneration is not allowed except in special circumstances.

The receiver is appointed on summons at Chambers Practice before a Master in Lunacy (u). The person appointed

Re Watkins, [1896] 2 Ch. 336. As to the jurisdiction in such cases, see s. 134, and *Re Carr's Trusts*, [1904] 1 Ch. 792; *Re de Larragoiti*, [1907] 2 Ch. 14; and also *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15.

(r) The effect of this enactment is to nullify the restrictions on the powers of receivers occasioned by such decisions as: *Re S. S. B.*, [1906] 1 Ch. 712; *Re De Moleyns and Harris's Contract*, [1908] 1 Ch. 110.

(s) *Re E. D. S.*, [1914] 1 Ch. 618: the proceeds will be resettled on analogous trusts.

(t) Where the lunatic is en-

titled to a grant of administration, the grant is made to the receiver if he has plenary powers, without, it seems, an order from the Master in Lunacy, but not if his powers are restricted; see *In the goods of Leese*, [1894] P. 160; *In the goods of Cooke*, [1895] P. 68; and Heywood and Massey's *Lunacy Practice*, 5th ed., p. 200.

(u) For title to proceedings and practice, see *Rules in Lunacy*, 1919, and Forms annexed; and rules of 1892-3. As to using one set of affidavits on two summonses where the facts are practically the same see *Re Morris*, [1912] 1 Ch. 730.

Chap. II. must, unless otherwise ordered, before acting give
 Sect. 11. security, to be fixed by the Master, duly to account for what he shall receive and to pay the same as the Master directs (x). The provisions of the Lunacy rules respecting a committee, his accounts, payments and matters of a like nature, apply with the necessary modifications to the case of a receiver (y).

When the property of a lunatic becomes subject to the control of the court in lunacy by the appointment of a receiver, and the receiver is in physical possession it cannot be seized under a writ of *fi. fa.* by an execution creditor of the lunatic, the lunatic's right to maintenance having priority over the claims of the execution creditor (z). But where a judgment creditor, having notice of the pendency of a summons in Lunacy for the appointment of a receiver, issued a *fi. fa.* under which the goods of the lunatic were seized before any order was made on the summons, and a receiver was afterwards appointed while the goods were in the possession of the sheriff, it was held that the creditor's claim must be satisfied before anything could be allowed for the maintenance of the lunatic (a). For a receiver in Lunacy is only authorised to take possession of the lunatic's equitable interest in his property; and accordingly an order under section 116 of the Lunacy Act, 1890 (53 Vict. c. 5), appointing such a receiver does not affect any previously acquired rights of third persons against the property of the lunatic, which are of such a nature that

(x) Rule 83. As to discharge Practice, 5th ed., p. 51; and rules of 1893, r. 9. on discharge, p. 96.

(y) Rule 84. See, further, as (z) *Re Winkle*, [1894] 2 Ch. 519.

Heywood and Massey's Lunacy (a) *Re Clarke*, [1898] 1Ch. 336.

effect can be given to them at law or in equity, as, for instance, a vendor's lien for unpaid purchase-money (b). Chap. 11.
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An order made by a Master in Lunacy under section 116 (1) (c) of the Lunacy Act, 1890, appointing a receiver and manager of the property of a person of unsound mind not so found by inquisition, who at the date of the order is "lawfully detained" under a reception order, does not necessarily come to an end when the reception order expires, but a further order is required to discharge it (c). But the existence of an order appointing a receiver of certain specified property of a debtor does not prevent a receiving order in bankruptcy being made against such debtor after he has been discharged from an asylum as sane (d). The authority of a receiver appointed under section 116 expires upon the death of the lunatic: he cannot, therefore, take credit for payments made (e), nor can his sureties be made liable for rents and profits received by him after that date (f).

It is not usual to appoint a receiver of the dividends of stock standing in the Bank of England in the name of a person of unsound mind not so found: the better course in such cases is to bring the stock into court (g). But where an order made under section 116 (d), of the Lunacy Act, 1890, authorised the receiver to receive and give a discharge for all dividends accrued due before

(b) *Davies v. Thomas*, [1900] 2 Ch. 462, at pp. 472, 473, explaining *Re Winkle*, *ubi supra*.

(c) *Re B. A. S.*, [1898] 2 Ch. 392.

(d) *Re a debtor*, [1913] W. N. 63; 108 L. T. 344.

(e) See *Re Bennett*, [1913] 2 Ch. 318.

(f) *Re Walker*, [1907] 2 Ch. 120. The receiver himself, it seems, could not be made liable in the lunacy, though he could be in properly constituted proceedings; see, also, *Re Seager Hunt*, [1906] 2 Ch. 295.

(g) *Re Browne*, [1894] 3 Ch. 412; *Re Auchmuty*, 99 L. T. 462.

Chap. II. lodgment, it was held that the Bank must pay these
Sect. 11. dividends to the receiver (*h*).

In a case in which a pauper lunatic, who was being maintained by the guardians of a union, became entitled on the death of an uncle to a sum of £261, an order was made by a Master in Lunacy, on the application by summons of the guardians, appointing a receiver of the £261, and directing him to pay out of it part of the cost of the past maintenance of the lunatic, and to apply the balance for her future maintenance (*i*).

Where, however, a receiver in Lunacy of funds of a lunatic living in a pauper asylum has been appointed, an injunction may be granted to restrain the guardians from levying a distress against trustees of the funds to enforce a magistrates' order for payment of the funds to the guardians, and the guardians may be ordered to pay the costs of an action brought by the lunatic, suing by the official solicitor as next friend, for the purpose of obtaining such an injunction (*k*).

The receiver is the statutory agent of the patient (*l*); a solicitor employed by the receiver has an independent right against the patient's estate and the Statute of Limitations cannot be pleaded by the receiver, unless the judge in his discretion so orders (*m*).

The appointment does not cause a forfeiture of a life interest, as the receiver is a statutory agent for the lunatic; and the appointment prevents a subsequent document

(*h*) *Re Spurling*, [1909] 1 Ch. 1913, see s. 13 (2) of that Act 199; see p. 201 for form of (3 & 4 Geo. 5, c. 28).

order. (*k*) *Winkle v. Bailey*, [1897] 1

(*i*) *Re Taylor*, [1901] 1 Ch. 123.

480. As to power of enforcing (*l*) *Plumpton v. Burkinshaw*,
orders for payment of expenses [1908] 2 K. B. 572.

under Mental Deficiency Act, (*m*) *Re E. G.*, [1914] 1 Ch. 927.

purporting to be a charge operating as a forfeiture since it is wholly void (n). Chap. II.
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In a proper case the court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and, if the case is urgent, will do so upon an *ex parte* application; but the person appointed must not, in default of a direction to the contrary, receive any part of the property until he has given security (o). And in such a case, if actions are pending against the supposed lunatic, the receiver's proper course is to apply to be appointed guardian *ad litem* in the several actions (p). Where a petition had been presented, but pending the hearing, a coroner's jury had found a verdict of murder while of unsound mind against the supposed lunatic, a receiver was appointed till further order, the expression "interim" receiver being inappropriate to such a case (q). Interim
receiver.

In *Re Cathcart* (r), pending an inquiry as to the lunacy of an alleged lunatic, the official solicitor had been appointed receiver of her estate, and in that capacity had in his possession a mass of documents belonging to her. Upon an application made on her behalf for liberty to inspect and take copies of such of the documents as she might require for her defence on the inquiry, the Court of Appeal held that the proper course would be for the Master in Lunacy, who had charge of the inquiry, to look through the documents and ascertain which of them were relevant to the inquiry; but that the parties were not at liberty to go before the Master for the purpose. Docu-
ments
belonging
to alleged
lunatic in
possession
of
receiver.

(n) *Re Marshall*, [1920] 1 Ch. 284.

(o) *Re Pountain*, 37 Ch. D. 609, 610.

(p) S. C., *per* Cotton, L.J., p. 610.

(q) *Re A. G.*, 53 S. J. 615.

(r) [1902] W. N. 80.

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Where there are no proceedings in Lunacy the High Court will not now, it seems, exercise its jurisdiction to order rents and profits of property belonging to a lunatic to be paid to a person for the benefit of the lunatic, if the latter is within the jurisdiction (s); application should be made to the court in lunacy for a receiver. The High Court may, however, make such an order where the lunatic is out of the jurisdiction (t), and if a foreign court of competent jurisdiction has appointed an administrator with authority to receive specified property of the lunatic in this country, the persons, in whose hands such property is, should hand it over to the administrator; if they insist on an action being brought in this country they will not be allowed costs (u).

SECTION 12.—IN THE CASE OF TENANTS IN COMMON.

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The Court of Chancery would not grant a receiver against a tenant in common in possession at the suit of another tenant in common, except in cases of destructive waste or gross exclusion (x). But under the Judicature Act, 1873, the court has jurisdiction in a partition action to appoint a receiver until the trial, although there has been no exclusive occupation (y).

Exclusion, in the true legal sense of the word, is where one tenant in common receives the whole of the rents and

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| (s) <i>Re Barker's Trusts</i> , [1904] | [1915] 1 Ch. 696. |
| W. N. 13. | (x) <i>Norway v. Rowe</i> , 19 Ves. |
| (t) <i>Re Carr's Trusts</i> , [1904] 1 | 159; see <i>Sandford v. Ballard</i> , |
| Ch. 792; see also <i>Didisheim v.</i> | 30 Beav. 109. |
| <i>London and Westminster Bank</i> , | (y) <i>Porter v. Lopes</i> , 7 Ch. D. |
| [1900] 2 Ch. 15. | 358. |
| (u) <i>Pélégriin v. Coutts & Co.</i> , | |

profits, and refuses to pay over to his co-tenant in common the share due to him (z). A bare notice to the tenants by one tenant in common, not to pay the rents any longer to the other tenant in common, is not an exclusion. Accordingly, a motion for a receiver by one tenant in common against his co-tenant in common, on the ground that the latter had advertised the estate for sale, and had given notice to the tenants to pay their rents to him alone, was refused, because the conduct complained of did not amount to an exclusion (a).

The same considerations are applicable to the case of equitable tenancy in common of an equitable estate. An equitable tenant in common was not entitled under the old practice to have a receiver appointed as against his co-tenant in common, unless there was exclusion. If the conduct of the tenant in common in possession amounted to exclusion, or if the trustee of the legal estate put him in possession of the whole estate to the exclusion of the other, a receiver of the whole estate would be appointed. If there was no exclusion, a receiver of the applicant's share only was appointed (b).

Instead of making an order for the appointment of a receiver, the court may order the tenant in possession to pay an occupation rent (c), or to give security for payment of the due proportion of the rents to his co-tenant (d).

Where some of the tenants in common are infants, too, *Hargrave v. Hargrave*, 9 Beav. 549; and cf. *Searle v. Smales*, 3 W. R. 437.

(z) *Tyson v. Fairclough*, 2 Sim. & St. 142; *Sandford v. Ballard*, 33 Beav. 401.

(a) *Tyson v. Fairclough*, 2 Sim. & St. 142; but see *Searle v. Smales*, 3 W. R. 437.

(b) *Sandford v. Ballard*, 30 Beav. 109; 33 Beav. 401; see, (c) *Porter v. Lopes*, 7 Ch. D. 359.

(d) *Street v. Anderton*, 4 Bro. C. C. 414; *Murray v. Cockerell* (1866) W. N. 223.

Chap. II. there may be a receiver over the whole estate, with
Sect. 12. directions to pay to the adults their shares in the rents (e).

In a case where there was a dispute between tenants in common of real estate, in reference to the receipt of rents, and some of the parties interested were infants and others tenants for life, the court appointed one of the disputants who had an estate for life, and another person nominated by the other parties, to be joint receivers of the whole estate (f). If a receiver has been appointed for the benefit of two infant tenants in common, he will not be discharged as to the share of one of them who has attained his full age. The object of the appointment having been to protect the property during the infancy of both, and the purpose for which the receiver was appointed having therefore not been fully accomplished, the application for his discharge should be delayed until both are of age (g). The one who since the appointment of a receiver has become adult may, however, apply for the payment of his share to himself (h).

Tenancy
in com-
mon when
an
interest in
land is in
the nature
of a trade.

If an interest in land to which two or more persons are entitled as tenants in common is in the nature of a trade, a receiver will be appointed or refused on the same principles as in partnership cases. A colliery, for instance, may be considered as being in the nature of a trade; and where persons have different interests in it, it may be regarded as a partnership; and the difficulty of knowing what is to be paid for wages, and the expenses of management, gives the court a jurisdiction as to the mesne profits which it would not assume with respect to other lands (i).

(e) *Smith v. Lyster*, 4 Beav. 227.

(h) *Ib.*

(f) *Ramsden v. Fairthrop*, 1 N. R. 389.

(i) *Jefferys v. Smith*, 1 J. & W. 298, at p. 302.

(g) *Smith v. Lyster*, 4 Beav.

There are two ways in which a mining concern may be viewed: it may be a mining concern really held as property by persons who have acquired it for the purposes of trade, as in a case where an estate containing mines has descended from the owner to two co-heirs; and such owners, though they did not acquire it for mining purposes, may nevertheless agree to work the mines together with their joint property. That would be working the mines in partnership. There would be a partnership in the working, though not in the land. The other case would be one in which the whole property was intended to be used as a partnership concern. In either case a receiver may be appointed upon the same principles as in other partnership cases (*k*).

SECTION 13.—IN THE CASE OF PERSONS IN POSSESSION OF REAL ESTATE UNDER A LEGAL TITLE.

The Court of Chancery would not, at the instance of a person alleging a mere legal title against another party who was in possession of real estate, and who also claimed to hold by a legal title, disturb that possession by appointing a receiver. There being open to the plaintiff a full and adequate remedy at common law, he had no equity to come to the Court of Chancery for relief. The court would not interfere with a legal title, unless there was some equity by which it could affect the conscience of the party in possession. There might be cases in which the court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed if steps were not taken, or where the

Sect. 13.

In what cases a receiver would not be appointed by the Court of Chancery

(*k*) *Roberts v. Eberhardt, Kay*, 159, *per* Lord Hatherley.

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contest lay between a person having a well-established pedigree and a person without any reasonable appearance of title ; but, as a general rule, where one person was in possession of the rents and profits of an estate, claiming to be the holder by a legal title, and another person also claimed to hold by a legal title, the former could not be ousted in the Court of Chancery until the true ownership of the legal title had been finally determined at law (l).

It was immaterial to the question that the possession might be vacant and that the court might not be asked to turn any one out of possession. The law looked on a person in possession of real estate as entitled to keep it until some one else could show a better title. Although the court would interfere to protect personal estate pending litigation as to probate, the case was different where real estate was the subject of contest (m).

In what cases the Court of Chancery would appoint a receiver against the legal estate.

The Court of Chancery would, however, interfere with the possession of a party holding under a legal title, by appointing a receiver, if a good equitable case were made to appear. If the court was satisfied, upon the pleadings and the materials it had before it, that the relief prayed by the bill would be given at the hearing, and that it was necessary, expedient, or equitable that the property in question should be secured until the hearing, there was a case for a receiver (n). Accordingly, a receiver would be appointed against a party having the legal title, if a case of fraud was made out to the satisfaction of the court (o). Where, for example, a man who had taken a

(l) *Earl Talbot v. Hope Scott*, 311 ; *Clark v. Dew*, 1 R. & M. 4 K. & J. 112 ; *Carrow v. Ferrior*, 103 ; *Bainbrigge v. Baddeley*, 3 L. R. 3 Ch. 719. Mac. & G. 420.

(m) *Carrow v. Ferrior*, L. R. 3 Ch. at p. 729. (o) *Huguenin v. Basley*, 13 Ves. 105 ; *Lloyd v. Passingham*, 16 Ves. 59.

(n) *Mordaunt v. Hooper*, Amb.

lease of copyholds, during the widowhood of a woman who was entitled thereto for her widowhood, had concealed the death of the widow, and, taking advantage of the loss of the court rolls, pretended that the premises were freehold and had descended to him as heir, Lord Hardwicke granted a receiver (*p*). So, where a bill was filed impeaching a sale of land on the ground of fraud, and alleging gross inadequacy of consideration and undue influence, the court appointed a receiver in a suit instituted against the devisees of the party charged with fraud (*q*). So, also, where a woman entitled to a life interest in certain real estates and a particular sum of stock, and a rentcharge issuing out of her husband's estates, fraudulently obtained a transfer of the stock, and sold it out, and afterwards assigned her life interest in the real estate and the rentcharge to her son for value, but with notice of the fraud, a receiver of the rents of the real estate, and of the rentcharge so assigned, was appointed at the suit of the persons interested in the stock after her death (*r*).

Another case in which the court would interfere, and appoint a receiver against persons holding under a legal title, was where trustees or executors had managed the trust estate improperly (*s*).

The disinclination of the Court of Chancery to appoint a receiver, where the property was in possession of a party having the legal estate, was felt in those cases only in which the estate of the party in possession was prior to that of the parties in litigation. Where the right

(*p*) *Mordaunt v. Hooper*, (*r*) *Woodyatt v. Gresley*, 8 Sim. Amb. 311. 187.

(*q*) *Stillwell v. Wilkins*, Jac. (*s*) *Supra*, pp. 16, 18, 82.

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to the possession was the subject of dispute, and the plaintiff, having an equitable interest, claimed the legal estate from the defendant in possession, the court would, if it saw clearly that the plaintiff had the right, and that the ultimate decree would be in his favour, appoint a receiver. Accordingly, a receiver would be appointed pending a suit for specific performance against a party holding under a legal title, if the court was satisfied that the decree would be in favour of the plaintiff, and that it was expedient or equitable that a receiver should be appointed (*t*). And upon the same principle, where a person took conveyance of a legal estate subject to equitable interests, if he did not satisfy those interests he had to submit to the appointment of a receiver (*u*). If, for example, the mortgagee of a legal estate subject to an equitable rentcharge refused to pay the rentcharge, a receiver would be appointed (*x*). So, also, where a judgment creditor had obtained possession of land under an *elegit*, a receiver was appointed at the suit of an equitable mortgagee by deposit of deeds, whose security was prior in date to the recovery of the judgment debt (*y*).

The rule, that a receiver would not be appointed when the person having the legal estate was in actual possession of the property, did not apply where the person in possession was in possession merely upon execution under a judgment. In such a case, a creditor who had taken out execution could not hold property against an estate created prior to his debt (*z*).

(*t*) *Supra*, pp. 81–85.

(*u*) *Pritchard v. Fleetwood*, 1 Mer. 54.

(*x*) *Ib.*; see, too, *Shee v. Harris*, 1 J. & L. 92.

(*y*) *Whitworth v. Gaugain*, Cr.

& Ph. 325; 3 Ha. 416; 1 Ph. 728; *Anderson v. Kemshead*, 16

Beav. 344.

(*z*) *Supra*, pp. 39, 55.

Cases where the appointment is made pending probate or a grant of administration are dealt with in section 3 (a). Chap. II.
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The extent to which the Judicature Act, 1873, has affected the jurisdiction of the court to appoint a receiver has already been discussed (b). Though in an action for the recovery of land, the High Court has jurisdiction, upon interim application, to appoint a receiver against a person in possession even under a legal title (c), that jurisdiction will be exercised with the utmost care, since it operates to prejudice the right of a defendant in possession to plead his possession as a statutory defence and put the plaintiff to proof of his paramount title, while the application compels the defendant to disclose his title: more, it puts the court in the difficulty that the substantial issue in the action may be determined, in effect, on evidence admissible on interlocutory application but not at the trial (d). If the defendant is actually in occupation the appointment will not be made, except in very special circumstances: it is not enough to show that the defendant is a married woman without means, and only discloses a shadowy title (e). Where there was vacant possession the appointment has been made in the absence of the owner of the legal estate (f). The occupation of tenants is an important factor, as, if the defendant were found to have no title they might not get a good discharge for their rents, and yet might be open to distress (g). In such cases the

(a) p. 25.

(b) *Ante*, p. 2. See also Ord. 50, r. 3, p. 4, *ante*.

(c) *Foxwell v. Van Grutten*, [1897] 1 Ch. 64.

(d) *Marshall v. Charteris*, [1920] 1 Ch. 520, 523, 524.

(e) *Ib.*

(f) *Berry v. Keen*, 51 L. J. Ch. 912.

(g) *John v. John*, [1898] 2 Ch. 573; see *Marshall v. Charteris*, *supra*; and *Gwatkin v. Bird*, 52 L. J. Q. B. 263; *Percy v. Thomas*, 28 Sol. Jo. 533.

Chap. II. plaintiff must make out his title, and where the defendant
 Sect. 13. disclosed only a very shadowy title the appointment has
 been made (*h*) ; and where the defendant lessee has been
 admittedly guilty of a breach of a covenant to carry on
 business on the premises the appointment has been made,
 even where the defendant was in occupation : thus in
 an action by a lessor for recovery of possession of an
 Receiver of licences. hotel where the licences were in jeopardy and there
 appeared to be a strong *prima facie* probability of the
 plaintiff succeeding in recovering possession at the trial,
 the Court on interlocutory motion appointed a receiver
 of the licences, which were ordered to be handed over to
 him, as well as of the rents and profits, and directed that
 the receiver should be at liberty to keep the premises open
 as an hotel and to do all acts necessary to preserve the
 licences (*i*).

SECTION 14.—IN OTHER CASES.

Sect. 14. During a recent war certain statutes known as the
 Alien Trading with the Enemy Acts authorised the Board of
 enemies. Trade to apply to the High Court for the appointment of a
 controller with all the powers of a receiver and manager
 in certain cases, and to appoint a controller to supervise the
 winding-up of certain businesses. As this legislation was
 of a temporary character it is not considered proper to
 deal with it here, although analogous legislation may be
 expected in similar circumstances. The effect of the

(*h*) *John v. John*, [1898] 2 Ch. 573 ; see *Marshall v. Charteris*,
supra ; and *Gwatkin v. Bird*,
 52 L. J. Q. B. 263 ; *Percy v.*
Thomas, 28 Sol. Jo. 533.

(*i*) *Leney & Sons, Ltd. v. Collingham*, [1908] 1 K. B. 79,
 correcting form of order drawn
 up in *Charrington & Co. v.*
Camp, [1902] 1 Ch. 386. See
 further for addition to order,

appointment of a controller was to displace a receiver appointed by the High Court. Chap. II
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Apart from this legislation, the court refused to appoint a receiver, on the application of the English manager carrying on business here on behalf of an alien enemy, of assets in this country (*k*). An alien enemy cannot sue in this country alone (*l*), though he can be added as a formal plaintiff, *e.g.*, in an action by co-partners to recover debts due to a partnership (*m*); he can, however, be a defendant (*n*). In this connection it is to be borne in mind that the test of enemy character is not nationality, nor place of birth, nor domicile, but the place where the person resides or carries on business (*o*).

An interim receiver may be appointed of a chattel in an action in which the owner sues for its return from a bailee, who claims a lien, and the receiver may be authorised to allow the owner to use the chattel (*p*).

The court or a judge may, in an interpleader to try the right to goods seized in execution under R. S. C. Ord. LVII. r. 15, order that, instead of a sale by the sheriff, a receiver and manager of the property be appointed (*q*).

The court has jurisdiction to appoint a receiver pending a reference to arbitration, if a proper case is Pending
reference
to arbitra-
tion.

(*k*) *Maxwell v. Greenhut*, 31 Times Rep. 79; *Re Gaudig and Blum*, ib. 315; *quære* the jurisdiction to make the appointment in *Re C. Bechstein*, 58 Sol. Jo. 863.

(*l*) *Porter v. Freudenberg*, [1915] 1 K. B. 857.

(*m*) *Rodriguez v. Speyer Bros.*, [1919] A. C. 59.

(*n*) *Porter v. Freudenberg*,

supra.

(*o*) Ib. p. 868. As to companies, *Daimler Co. v. Continental Tyre Co.*, [1916] 2 A. C. 307; *Re Hilckes*, [1917] 1 K. B. 48.

(*p*) *Hatton v. Car Maintenance Co.*, [1915] 1 Ch. 621.

(*q*) *Howell v. Dawson*, 13 Q. B. D. 67.

Chap. II. made out for doing so (r). Where there is an agreement
 Sect. 14. to refer all matters in dispute under a contract to arbitration, and an action is subsequently brought on the contract, in which it is found to be desirable, for the protection of the property which is the subject of the contract, that a receiver should be appointed, it is competent for the court to appoint a receiver, and by the same order to stay all further proceedings in the action, except for the purpose of carrying out the order for a receiver (s).

Receiver
 appointed
 pending
 litigation
 in a
 foreign
 court.
 Tithe
 rent-
 charge.

The court has jurisdiction to appoint a receiver pending litigation in a foreign court (t).

By sub-section 3 of section 2 of the Tithe Act, 1891, tithe rentcharge which is three months in arrear is to be recovered by the appointment of a receiver by the County Court (u), except in cases covered by sub-section 2, i.e., where the owner of the lands is in occupation, in which case the remedy is by distress: sub-section 2 only applies where the owner is in occupation of the whole of the lands (x). Where land was let at ground rents the order contained a declaration that the receiver was only to receive the rack rents paid by occupiers (y).

(r) *Law v. Garrett*, 8 Ch. D. 26; *Halsey v. Windham* (1882), W. N. 108.

v. Puleston (1880), W. N. 89, 127; *Law v. Garrett*, 8 Ch. D. 27.

(s) *Compagnie du Sénégal v. Wood*, 53 L. J. Ch. 167; (1883), W. N. 180; *Pini v. Roncoroni*, [1892] 1 Ch. 633.

(u) For forms see Tithe Rentcharge Recovery Rules, Form 8.

(x) *Ecclesiastical Commissioners v. Upjohn*, [1913] 1 K. B. 501.

(t) *Transatlantic Co. v. Pietroni*, John. 607; see, too, *Evans*

(y) *Peed v. King*, 11 Times Rep. 18.

CHAPTER III.

OVER WHAT PROPERTY A RECEIVER MAY BE APPOINTED.

IN determining whether or not the property is of such Chap. III.
a nature that the court will appoint a receiver of it, it is
necessary to consider the nature of the applicant's title.

There is considerable difference according to whether the appointment is made to preserve the subject-matter of a suit or by way of equitable execution. In the former case the appointment extends over the whole subject-matter, real and personal, including both legal and equitable interests (a); in the latter case there are certain well-defined restrictions as to the property which will be subjected to the appointment, and these are discussed in the latter part of this chapter (b).

Where the application is made for the purpose of preserving the subject-matter of the suit, it is most frequently made at the instance of an incumbrancer seeking to enforce his charge. In such cases it must be shown that the property is capable of assignment, and that *primâ facie* a valid assignment or charge has been made, for otherwise the applicant has no title to maintain the suit.

It is not proposed to specify every description of property which is, or is not, assignable. Present and future earnings (c), present and future debts, possibilities

(a) See *Davis v. Duke of Marlborough*, 1 Sw. p. 83; 2 Sw. p. 132.

(b) See pp. 133-136.

(c) *Holmes v. Millage*, [1893] 1 Q. B. 554, 559; *Horwood v. Millar's Timber and Trading Co.*,

Ltd., [1917] 1 K. B. 312. It is, however, presumed that a court would not appoint a receiver so as to deprive a man of his whole means of living.

Chap. III. and expectancies (d) are assignable. In some cases, however, though the assignment in itself be valid, the instrument of assignment may contain provisions, invalid as offensive to public policy or otherwise, which invalidate the assignment also (e).

The assignment of certain forms of property is void in some cases as contrary to public property, in others as forbidden by statute. Thus assignments of the following are void as contrary to public policy: the pay or half-pay of an officer in the Army, Navy, or Air Force (f), or the salary of a person holding a civil office in the public service (g); the salary of a clerk of the peace; a freehold office connected with the administration of justice (h); of a clerk of petty sessions in Ireland, as he is a public and judicial officer (i); sums payable to an assistant parliamentary counsel to the Treasury (k).

Pensions or half-pay involving any liability to future service are inalienable (l); but where they are granted wholly in consideration of past services they are alien-

(d) *Tailby v. Official Receiver*, 28; see *Palmer v. Vaughan*, 13 App. Cas. 542; *Re Lind*, 3 Swa. 173. [1915] 1 Ch. 744; 2 Ch. 345.

(e) *Horwood v. Millar's Trading and Timber Co., Ltd.*, [1917] 2 Ir. R. 69.

(f) See *Apthorpe v. Apthorpe*, 1 K. B. 305.

(g) See *Apthorpe v. Apthorpe*, 12 P. D. 192; *Ex parte Huggins*, 21 Ch. D. 85; *Re Mirams*, [1891] 1 Q. B. 594.

(h) *Cooper v. Reilly*, 2 Sim. 560, and cases cited in preceding note. *Quærc* as to a salary of a member of Parliament, see *Hollinshead v. Hazleton*, [1916] 1 A. C. 428.

(i) *Palmer v. Bate*, 6 Moo. 2 Ir. R. 386.

(j) *M'Creery v. Bennett*, [1904] 2 Ir. R. 69.

(k) *Cooper v. Reilly (supra)*, these fees were irrecoverable at law.

(l) *Wells v. Foster*, 8 M. & W. 152; *Macdonald v. O'Toole*, [1908] 2 Ir. R. 386; and see *Knill v. Dumergue*, [1911] 2 Ch. 199. As to how far pensions and allowances under the Superannuation Act, 1859, involve liability to future services, see *Macdonald v. O'Toole*, [1908]

able (*m*) unless alienation is prohibited by statute (*n*). Chap. III. The following have been held assignable: salary of a chaplain to a workhouse (*o*); of the office of Master Forester to a royal forest (*p*); unascertained sums due from an insurance committee to a panel doctor (*q*); a retiring annuity or pension payable to a covenanted member of the Indian Civil Service (*r*); a pension payable to a member of the Royal Irish Constabulary without liability to serve again (*s*). In an Irish case (*t*) it was held in effect that arrears of a salary, though possibly future payments were not assignable, might be assigned; but even if this decision be correct, arrears of a pension inalienable by statute cannot be assigned before they are actually paid over (*u*).

The following are unassignable by statute: pensions and allowances granted to officers or men, or to widows or dependents of officers and men who have been in the naval (*v*), military (*x*), or air (*y*) service of the Crown; separation allowance to wives of soldiers (*z*); pensions

- (*m*) See *Davis v. Duke of Marlborough*, 1 Sw. 74, 79; (*t*) *Picton v. Cullen*, [1900] 2 Ir. R. 612. See *Price v. Lovett*, 20 L. J. Ch. 270.
- (*n*) See *Dent v. Dent*, 1 P. & M. 366; (*u*) *Crowe v. Price*, 22 Q. B. D. 429; *Jones v. Coventry*, [1909] 2 K. B. 1029.
- (*o*) *Willcock v. Terrell*, 3 Ex. D. 323; (*v*) *Manning v. Mullins*, [1898] 2 Ir. R. 34; (*x*) *Naval Pensions Act*, 1865.
- (*p*) *Knill v. Dumergue*, *supra*. As to mode of obtaining payment, see p. 399. (*y*) *Army Act*, 1881, s. 141.
- (*q*) See *infra* as to statutory prohibitions. Pensions to widows and dependents were made unassignable by 46 Geo. 3, c. 69, s. 7; 47 Geo. 3, c. 25, s. 4; see *St. Law Rev. Act*, 1872, No. 2.
- (*r*) *Re Mirams*, [1891] 1 Q. B. 594. (*z*) *Air Force Act*, 1917, which makes s. 141, *Army Act*, applicable.
- (*s*) *Blanchard v. Cawthorne*, 4 Sim. 566. (*z*) *Army Act Amendment Act* (No. 2), 1915, s. 1.
- (*t*) *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K. B. 499.
- (*u*) *Knill v. Dumergue*, *supra*.
- (*v*) See *Manning v. Mullins*,

Chap. III. payable to members of the police force (*a*); to poor law officials (*b*); to officials employed in asylums (*c*); superannuation allowance or gratuity to school teachers (*d*); naval prize money (*e*); old age pensions (*f*); pension payable to a retiring incumbent (*g*); pension payable to an Irish town clerk (*h*). A lump sum payable as compensation under the Superannuation Act, 1909, is in the same position as a pension (*i*).

Money received for commutation of a pension does not come within the prohibition against alienation in section 141 of the Army Act, 1881 (*k*). After money has been actually paid over as an instalment of a pension by the Paymaster it loses the protection and may be assigned or attached, but this does not include money credited to a pensioner's account at a bank, in respect of a warrant which has not been paid by the Paymaster (*l*).

Fellow-
ship.

Though in one case (*m*) a receiver over the profits of a fellowship was refused, it was subsequently held that there might be a receiver of past and future appropriations

(*a*) Police Act, 1890, s. 7.

(*b*) Poor Law Officers Superannuation Act, 1896.

(*c*) Asylum Officers Superannuation Act, 1909, including those employed in institutions for defectives; see Asylums and Certified Institutions (Officers Pensions) Act, 1918.

(*d*) School Teachers Superannuation Act, 1918, s. 7.

(*e*) Naval Distribution and Agency Act, 1864, s. 15.

(*f*) Old Age Pensions Act, 1908, s. 6.

(*g*) Incumbents Resignation Act, 1871, s. 10.

(*h*) Under Local Officers Superannuation (Ireland) Act, 1869: *Brennan v. Morrissey*, 26 L. R. Ir. 618.

(*i*) See *Re Lupton*, [1912] 1 K. B. 107; see also *Macdonald v. O'Toole*, [1908] 2 Ir. R. 386.

(*k*) *Crowe v. Price*, 22 Q. B. D. 429; see *Price v. Lovett*, 20 L. J. Ch. 270.

(*l*) *Jones & Co. v. Coventry*, [1909] 2 K. B. 1029; in the former case the remedy is attachment not equitable execution.

(*m*) *Berkeley v. King's College*, 10 Beav. 602.

in respect of the profits of a fellowship, the duties being Chap. III. so light that no questions of public policy could interfere with the validity of the assignment (*n*). Similarly, a receiver has been appointed of the profits of a canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence and of attendance on divine service, the performance of which duty by the canon was of no benefit to the public (*o*).

There cannot be a receiver of the profits of an ecclesiastical benefice, either at the instance of an assignee or a judgment creditor; for a beneficed clergyman is prohibited by the statute 13 Eliz. c. 20 from charging the fruits of his living (*p*). The statute of Elizabeth was repealed by the statute 43 Geo. 3, c. 84, passed in the year 1803, and so the law remained until the year 1817, when, by the statute 57 Geo. 3, c. 99, the charging of ecclesiastical benefices was again prohibited, and the statute of Elizabeth was revived: so that between the years 1803 to 1817 there was no law prohibiting a clergyman from charging his ecclesiastical benefice (*q*); and a receiver was accordingly on several occasions, in cases arising between those years, appointed over an ecclesiastical benefice (*r*). The policy of the statute 13 Eliz. c. 20, revived by 57 Geo. 3, c. 99, was not in any way affected by the Judgments Act, 1838 (1 & 2 Vict. c. 110). A judgment against a beneficed clergyman does not create a

Ecclesiastical benefices.

(*n*) *Feistel v. King's College*, 10 Beav. 491. Most fellowships now involve considerable duties.

(*o*) *Grenfell v. Dean and Canons of Windsor*, 2 Beav. 544.

(*p*) *Hawkins v. Gathercole*, 6 D. M. & G. 1; see *Long v. Storie*, 3 De G. & Sm. 309.

(*q*) *Metcalf v. Archbishop of York*, 1 M. & C. 553.

(*r*) *Silver v. Bishop of Norwich*, 3 Sw. 112 n.; *White v. Bishop of Peterborough*, 3 Sw. 109; *Metcalf v. Archbishop of York*, 1 M. & C. 553.

Chap. III. charge upon his benefice, entitling the judgment creditor to obtain, under the last-mentioned Act, a charging order and the appointment of a receiver of the profits of the benefice. The statute of Elizabeth in effect prevents such a creditor from taking proceedings to obtain a charging order, and he cannot have a receiver appointed over the profits of the benefice (s).

The effect of a restraint on anticipation in the case of married women is discussed in another place (t).

Alimony,
&c.

Sums ordered to be paid for the following purposes are unassignable and consequently a receiver cannot be appointed over them, viz.: a weekly sum ordered by a court of summary jurisdiction to be paid by a husband to a wife for her maintenance under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39) (u); alimony ordered to be paid to a wife judicially separated (x); maintenance ordered to be paid under section 1 of the Divorce and Matrimonial Causes Act, 1866 (y), by a husband for the support of his divorced wife (z); sums payable under a bastardy order (a).

The following are assignable, viz.: sums payable to a wife under a separation deed (b) and *semble* an annuity secured for a divorced wife under section 22 of the Divorce and Matrimonial Causes Act, 1857 (c).

(s) *Hawkins v. Gathercole*, 6 Matrimonial Causes Act, 1907
D. M. & G. 1; *Bates v. Brothers*, (7 Edw. 7, c. 12).
2 Sm. & G. 509.

(t) P. 136.

(z) *Watkins v. Watkins*, [1896]
P. 222.

(u) *Paquine v. Snary*, [1909]
1 K. B. 688.

(a) *Re Harrington*, [1908] 2
Ch. 687.

(x) *Re Robinson*, 27 Ch. D.
160; see *Linton v. Linton*, 15
Q. B. D. 239.

(b) *Victor v. Victor*, [1912]
1 K. B. 247; and see *Clark v.*
Clark, [1906] P. 331.

(y) Repealed and extended by

(c) *Harrison v. Harrison*, 13

Arrears of maintenance are, it seems, assignable (*d*) ; Chap. III. but it is submitted that a receiver would not be appointed over them, at all events during the life of the husband, since the enforcement of payment of such arrears is wholly in the discretion of the court in divorce (*e*), and it is presumed that payment would only be enforced in favour of that person for whose support the maintenance was ordered to be paid. The same appears to be the case with arrears of alimony. Inasmuch as the wife can claim against her husband's estate after his death for arrears of alimony, and therefore presumably of maintenance (*f*), possibly after the husband's death a receiver might be appointed over such arrears.

Many descriptions of property over which a receiver will be appointed for purposes of preservation or to enforce a charge, are mentioned in the various sections of Chapter II. (*g*) ; there is practically no limit in respect of the property in such cases : thus, a receiver has been appointed over public house licences (*h*), tithes (*i*), heir-looms (*k*), a motor car (*l*), a newspaper (*m*), profits of a

P. D. 180 ; this section was repealed and extended by the Matrimonial Causes Act, 1907.

(*d*) *Per* Lindley, L.J., in *Watkins v. Watkins*, [1896] P. 228.

(*e*) See *Robins v. Robins*, [1907] 2 K. B. 13 ; *Ivimey v. Ivimey*, [1908] 2 K. B. 260 ; *Brydges v. Brydges*, [1909] P. 187.

(*f*) *Re Stillwell*, [1916] 1 Ch. 365. *Quære*, however, whether the court would not refuse the order in a case of equitable execution.

(*g*) *Ante*, pp. 14 *et seq.*

(*h*) *Charrington v. Camp*, [1902] 1 Ch. 386 ; *Leney v. Collingham*, [1908] 1 K. B. 79.

(*i*) *Lymberg v. Helsham*, 1 Ir. Ch. R. 633.

(*k*) *Earl of Shaftesbury v. Duke of Marlborough*, Seton, 7th ed., 734.

(*l*) *Hatton v. Car Maintenance Co.*, [1915] 1 Ch. 621.

(*m*) *Kelly v. Hutton*, 17 W. R. 425 ; *Chaplin v. Young*, 6 L. T. 97.

Chap. III. solicitor's business (*n*). *Seem*, a receiver may be appointed over a patent, whether being worked or not, at the instance of an assignee (*o*). In some cases certain property, *e.g.*, uncalled capital (*p*), will be excluded from the order appointing a receiver where the applicant's charge can be made effective by other means ; in other cases special powers are given to the receiver (*q*) in accordance with the nature of the property (*r*).

Ships. A receiver has been appointed of a ship (*s*), of a ship and her gear (*t*), of the freight of a ship (*u*), and of the machinery of a steam vessel (*x*). So, also, a receiver may be appointed when an action of co-ownership is brought by the owner of one moiety of a vessel against the owner of the other moiety (*y*).

In a case where the legal title to a ship was in question, and the plaintiff had no equitable as distinct from a legal title, a receiver was refused, but an order was made by which the legal proceedings for ascertaining the title were accelerated, and the court took possession of the ship, giving each party liberty to apply for the possession and use upon giving security to deal with her as the court should direct (*z*).

Rates and tolls. A receiver was refused of rates which were to be assessed at a future period, for until the assessment there is nothing

(*n*) *Candler v. Candler*, Jac. *Smith, &c. Co.* (1883), W. N. 180 ; 225. 53 L. J. Ch. 166.

(*o*) See *Edwards & Co. v. Picard*, [1909] 2 K. B. 903. (*u*) *Roberts v. Roberts*, Seton, 6th ed., p. 772 ; *Burn v. Herlerson*, 56 L. T. 722.

(*p*) See *post*, p. 140.

(*q*) See especially Chapter IX.

(*r*) *E.g.*, *Leney v. Collingham*, & G. 831 ; 10 Ha. 334. (*x*) *Brenan v. Preston*, 2 D. M. & G. 831 ; 10 Ha. 334.

supra. (*y*) *The Amphill*, 5 P. D. 224.

(*s*) *Re Edderside*, 31 Sol. J. 744. (*z*) *Ridgway v. Roberts*, 4 Hare, 106.

(*t*) *Compagnie du Sénégal v.*

to collect (a). The case of tolls is different from the case of rates. Tolls being a fixed payment and in the nature of a rent, there may be a receiver of the tolls of turnpike roads, or of canal or railway, dock or market companies (b). The extent to which a receiver may be appointed over the undertaking of a statutory company or corporation has been already dealt with (c). The management remains in the hands of the trustees or others empowered by statute to manage it: a receiver does no more than take the rates, tolls, and taxes, pay the expenses of the undertaking and the interest on the mortgages, and then pay the surplus into court (d).

It is not necessary, in order that the court may have jurisdiction to appoint a receiver, that the property in respect of which he is to be appointed should be in England, or indeed, in any part of his Majesty's dominions (e). Persons have been appointed to receive the rents and profits of real estates, and to convert, get in, and remit the proceeds of property and assets, in cases in which the estate or property in question has been in Ireland (f); in the West Indies (g); in India (h); in

(a) *Drewry v. Barnes*, 3 Russ. 105; but see *Gibbons v. Fletcher*, 11 Ha. 251; also *Willis v. Cooper*, 44 Sol. Jo. 698, order refused as to untaxed costs.

(b) *Drewry v. Barnes*, 3 Russ. 105; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; *De Winton v. Mayor, &c. of Brecon*, 26 Beav. 533; *Lord Crewe v. Edleston*, 1 D. & J. 93; *Munns v. Isle of Wight Railway Co.*, L. R. 5 Ch. 418; see, as to form of order, *Re Manchester and Milford Railway Co.*, Seton,

7th ed., p. 736; *Re Ticehurst Gas and Water Co.*, 128 L. T. Jo. 516.

(c) *Ante*, p. 59.

(d) *Ames v. Birkenhead Docks*, 20 Beav. 350; see *Carmichael v. Greenock Harbour Trustees*, [1910] A. C. 274.

(e) *Houlditch v. Lord Donegal*, 8 Bligh, 344.

(f) *Ib.*; *Bolton v. Curre* (1894), W. N. 122; *Seton*, 7th ed., p. 776.

(g) *Bunbury v. Bunbury*, 1 Beav. 336; *Barkley v. Lord Reay*, 2 Ha. 308.

(h) *Logan v. Princess of Coorg*,

Property
in foreign
parts.

Chap. III. Canada (*i*) ; in China (*k*) ; in Italy (*l*) ; in America (*m*) ; in New South Wales (*n*) ; in Jersey (*o*) ; in Brazil (*p*) ; and in Peru (*q*). But the court will not make such an order if it would be useless (*r*). Although the court has no power of enforcing in places beyond the jurisdiction its orders and decrees, the receiver may be authorised to proceed abroad (*s*), and a party to the cause who resists him or his attorney will be guilty of contempt (*t*). A man will not, however, be appointed receiver of an estate which is out of the jurisdiction, unless he is within the reach of the court, or has submitted himself, or is amenable, to its jurisdiction (*u*).

The course which the court usually adopts, where an estate is in a foreign country or out of the jurisdiction, is to appoint a receiver in this country, with power, if it be found expedient, to appoint an agent, with the approbation of the judge, in the country where the estate is situate, to collect the estate and remit the same to the receiver in this country (*x*). The receiver or his agent

Seton, 7th ed., p. 776 ; *Keys v. Keys*, ib. ; 1 Beav. 425.

(*i*) *Tylee v. Tylee*, Seton, 7th ed., p. 777.

(*k*) *Hodson v. Watson*, Seton, 7th ed., p. 776.

(*l*) *Hinton v. Galli*, 24 L. J. Ch. 121 ; *Drewry v. Darwin*, Seton, 7th ed., p. 777.

(*m*) *Hanson v. Walker*, Seton, 7th ed., p. 777.

(*n*) *Underwood v. Frost*, Seton, 7th ed., p. 776.

(*o*) *Smith v. Smith*, 10 Ha. App. 71.

(*p*) *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

(*q*) *Re Huinac Copper Mines*, [1910] W. N. 218.

(*r*) *Mercantile Investment Co. v. River Plate Trust*, [1892] 2 Ch. 303.

(*s*) See form of order in *Palmer's Company Prec.*, Vol. III., p. 761. The debenture holders consented.

(*t*) *Langford v. Langford*, 5 L. J. Ch. N. S. 60.

(*u*) See *Houlditch v. Lord Donegal*, 8 Bligh, 344 ; *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416.

(*x*) *Anon. v. Lindsay*, 15 Ves. 91 ; *Keys v. Keys*, 1 Beav. 425 ; *Smith v. Smith*, 10 Ha. App. 71 ;

will recover possession of the estate according to the laws of the country in which it is found (y). The receiver will, when necessary, be empowered to sell lands abroad, according to a scheme approved by the judge (z). Where a receiver in a debenture holder's action was unable to obtain possession of the property, because the courts of the country (Peru) in which it was situate refused to recognise any title other than that of the company, the court ordered the company to appoint attorneys to take possession on behalf of the receiver (a). Chap. III.

Where the appointment is sought by way of equitable execution, the property over which a receiver will be appointed is more restricted. It must be shown, not only that the property, over which the appointment is required, is capable of assignment, though this is essential (b); it must also be shown, except in cases of fraudulent conduct on the part of the judgment debtor or other very special circumstances, that legal execution is impossible owing to some impediment arising from the character in law, of the judgment debtor's interest (c). It is not sufficient to show that the property is inaccessible to legal execution (d): the judgment creditor must go further and show that there are certain difficulties arising from Equitable execution.

Hinton v. Galli, 24 L. J. Ch. 211; Seton, 7th ed., p. 777.

(y) *Smith v. Smith*, 10 Ha. App. 71. Consider *Re Maudslay, Sons, & Field*, [1900] 1 Ch. 602, 611; and *Re Derwent Rolling Mills Co.*, 21 Times Rep. 81, 701.

(z) *Tylee v. Tylee*, Seton, 7th ed., p. 777.

(a) *Re Huinac Copper Mines*,

[1910] W. N. 218: security is not required from the attorney.

(b) See *ante*, p. 123, as to pensions and other property which are incapable of assignment.

(c) *Holmes v. Millage*, [1893] 1 Q. B. 551; *Morgan v. Hart*, [1914] 2 K. B. 183, where the prior cases are reviewed.

(d) *Holmes v. Millage, supra*.

Chap. III. the nature of the interest of the debtor in the property which make legal execution impossible, but which if removed would enable legal execution to issue (e). The Judicature Act has made no difference in this respect: the court still applies the principles upon which the Court of Chancery formerly acted, in determining whether equitable execution can issue (f). If, however, it is proved that the judgment debtor is threatening or intending to deal with the property in such a manner as to amount to a fraudulent attempt to defeat the rights of creditors, or in some other analogous circumstances, a receiver may be granted even over property susceptible to legal execution (g), as, for instance, where the debtor, a German company, was endeavouring to collect debts due to it and remove the proceeds from the jurisdiction (h).

In accordance with these principles the court will not, except in the very special circumstances mentioned, appoint a receiver by way of equitable execution over property which can be reached by *fi. fa.*, *elegit*, or attachment of debts (i); nor over present or future earnings (k); nor over money paid for admission at a theatre (l); nor over debts merely because a security is about to be created

(e) *Per* Cotton, L.J., *Re Shephard*, 43 Ch. D. 135; *per* Bowen, L.J., *ib.*, p. 137; *Holmes v. Millage*, [1893] 1 Q. B. 555; *Harris v. Beauchamp*, [1894] 1 Q. B. 801.

(f) *Holmes v. Millage*, *supra*; *Edwards & Co. v. Picard*, [1909] 2 K. B. 903; *Morgan v. Hart*, *supra*.

(g) See *Manchester and Liverpool District Banking Co. v. Parkinson*, 22 Q. B. D. 173;

Harris v. Beauchamp Bros., [1894] 1 Q. B. 801, 806, 810, 811.

(h) *Goldschmidt v. Oberrheinische Metallwerke*, [1906] 1 K. B. 373.

(i) See *Holmes v. Millage*, *Morgan v. Hart*, *supra*.

(k) *Holmes v. Millage*, *supra*, including directors' fees not earned; see *Hamilton v. Brogden* (1891), W. N. 36.

(l) *Cadogan v. Theatres, Ltd.*, [1894] 3 Ch. 338.

over them (*m*); nor over furniture of the debtor stored with that of other persons so as to be indistinguishable by the judgment creditor (*n*); nor over a patent not being worked (*o*); nor over a legal remainder (*p*). Chap. III.

A receiver may be appointed over an equity of redemption (*q*); in a theatre (*r*); where a legal estate is outstanding (*s*); where a fund in another court is payable to a judgment debtor (*t*); over the income of a trust fund (*u*); over a judgment debtor's interest in an outstanding charge upon land and subsisting policies of insurance (*x*); over the interest of a joint tenant (*y*). Again, a receiver may be appointed of a reversionary interest (*z*); of a sufficient portion of a reversionary legacy to satisfy plaintiff's debt (*a*). The appointment

(*m*) *Harris v. Beauchamp Bros.*, *supra*.

(*n*) *Morgan v. Hart*, *supra*. In *Hills v. Webber*, 17 Times Rep. 513, a receiver was appointed over the interest of the debtor who was joint tenant of three houses, two of which only were subject to a mortgage, but the circumstances were special.

(*o*) *Edwards & Co. v. Picard*, *supra*: the proceeds of a patent being worked by a licensee could be reached by legal execution.

(*p*) See *Harrison v. Bottomley*, [1899] 1 Ch. 465.

(*q*) *Ex parte Evans*, 13 Ch. D. 253; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Smith v. Cowell*, 6 Q. B. D. 75.

(*r*) *Cadogan v. Lyric Theatres, Ltd.*, [1894] 3 Ch. 338.

(*s*) *Wells v. Kilpin*, L. R. 18 Eq. 298.

(*t*) *Westhead v. Reilly*, 25 Ch. D. 413. Where the fund is in court a charging order is the appropriate remedy; see *Fahey v. Tobin*, [1901] 1 Ir. R. pp. 516, 517.

(*u*) *Oliver v. Lowther*, 28 W. R. 381; *Webb v. Stenton*, 11 Q. B. D. 530.

(*x*) *Beamish v. Stevenson*, 18 L. R. Ir. 319; see *Orr v. Grier-son*, 28 L. R. Ir. 20.

(*y*) *Hills v. Webber*, 17 Times Rep. 513. It seems that the tenants should attorn and pay a proper proportion of their rents to the receiver.

(*z*) *Fuggle v. Bland*, 11 Q. B. D. 711; *Tyrrell v. Painton*, [1895] 1 Q. B. 202; *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157.

(*a*) *Macnicoll v. Parnell*, 35 W. R. 773.

Chap. III. over interests in partnership property is discussed in the previous chapter (b).

The receivership can only affect the interest of the debtor (c).

Cases in which a receiver will not be appointed.

A receiver cannot be appointed to receive the interest of a fund, the disposal of which is in the absolute discretion of trustees. A receiver cannot be appointed unless it be clearly shown that there is something payable to the defendant in such a way as to make his interest assignable. There is no case in which a receiver has been directed to receive a sum the payment of which is wholly contingent and dependent on the will of another person (d).

It has been held in Ireland that a receiver will not be appointed over a gratuity which has been awarded to a public servant before it is paid over (e); and the same would be the case with a gratuity which a private employer had expressed an intention to pay (f). A receiver will not be appointed where the effect of the appointment might be to destroy the property (g), though the appointment of a receiver, without powers of management, may be obtained by the incumbrancer of a business, and the goodwill thus destroyed (h).

Separate estate of married women.

A judgment creditor may obtain a receiver over the separate estate of a married woman which she is not

(b) *Ante*, p. 53.

(c) *Wills v. Luff*, 38 Ch. D. 200.

(d) *Reg. v. Lincolnshire County Court Judge*, 20 Q. B. D. 167; and see *Willis v. Cooper*, 44 Sol. Jo. 698, where a receiver over untaxed costs was refused.

(e) *Timothy v. Day*, [1908]

2 Ir. R. 26; but see *Re Lupton*, [1912] 1 K. B. 107. See also *Wells v. Wells*, [1914] P. 157 (barrister's fees).

(f) *Timothy v. Day*, *supra*, at p. 31.

(g) *Hamilton v. Brogden* (1891), W. N. 14.

(h) *Ante*, p. 80.

restrained from anticipating (*i*) ; and also to enforce a Chap. III. judgment for a debt incurred before marriage (*k*) over property subjected to a restraint on anticipation by a settlement made by the married woman of her own property (*l*) ; but where the judgment includes interest accrued due since the marriage a receiver cannot be appointed, as the judgment debt cannot be split, and there is no jurisdiction to appoint a receiver to enforce payment of the interest accrued due since the marriage (*m*). Where the restraint is imposed by a settlement of property not, belonging to the married woman, a receiver cannot be appointed, even to enforce payment of a debt incurred before marriage (*n*). In the case of debts incurred by a married woman before the Married Women's Property Act, 1893, it was held that a receiver might be appointed over arrears accrued due before judgment in respect of income which she was restrained from anticipating (*o*) ; but not in respect of arrears accrued due after judgment (*p*). But the effect of the Married Women's Property Act, 1893, is that now, in the case of debts incurred since 1893, a receiver cannot be appointed over arrears of income subject to a restraint whether accrued due before or after

(*i*) *Bryant v. Bull*, 10 Ch. D. 153 ; *Re Peace & Waller*, 24 Ch. D. 405 ; *Perks v. Mylrea* (1884), W. N. 64 ; even though the claim is for untaxed costs : *Cummins v. Perkins*, [1899] 1 Ch. 16.

(*k*) This includes a second marriage : *Jay v. Robinson*, 25 Q. B. D. 467.

(*l*) S. 19, Married Women's Property Act, 1882.

(*m*) *Rothschild v. Fisher*, [1920] 2 K. B. 243.

(*n*) *Birmingham Excelsior Money Society v. Lanc*, [1904] 2 K. B. 35.

(*o*) *Hood Barrs v. Heriot*, [1896] A. C. 174.

(*p*) *Bolitho v. Gidley*, [1905] A. C. 98 ; *Whiteley v. Edwards*, [1896] 2 Q. B. 48 ; *Re Lumley*, [1896] 2 Ch. 690.

Chap. III. judgment (q). The death of the husband and consequent cesser of the restraint does not enable a receiver to be appointed over income to which the restraint attached at the date of the contract (r).

By section 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), in any action or proceeding instituted by a married woman (s), the court before which the action or proceeding is pending (t) may order payment of the costs of the opposite party (u) out of property which is subject to a restraint on anticipation, and may enforce such order by the appointment of a receiver. The receiver may be appointed generally over the settled property not limited to the period during which the restraint continues (x). This section applies only where the litigation is initiated by the married woman (y); it therefore has no application where there has been an unsuccessful appeal by a married woman defendant (z); nor where a married woman has presented a petition in

(q) *Wood v. Lewis*, [1914] 3 K. B. 73; following *Barnett v. Howard*, [1900] 1 Q. B. 784; even though she has a protection order: *Hill v. Cooper*, [1893] 2 Q. B. 85.

(r) *Brown v. Dimpleby*, [1904] 1 K. B. 28; *Pelton v. Harrison*, [1891] 2 Q. B. 422; the same applies where a woman is divorced: *Barnett v. Howard*, *supra*.

(s) As to costs of King's Proctor, see *Kennard v. Kennard*, [1915] P. 194.

(t) The action may be pending though judgment has been

entered.

(u) A co-respondent allowed to intervene is an opposite party within the section: *Studley v. Studley*, [1913] P. 119.

(x) *Studley v. Studley*, *supra*.

(y) *Hood Barrs v. Heriot*, [1897] A. C. 177; see *Huntly v. Gaskell*, [1905] 2 Ch. 656, where the order for a receiver was made in a case where a married woman was co-plaintiff with her husband.

(z) *Hood Barrs v. Heriot*, [1897] A. C. 177; *Dresel v. Ellis*, [1905] 1 K. B. 574.

an action (*a*) ; or has entered a *caveat* (*b*) ; or has taken out a summons in a divorce suit after decree absolute (*c*). But it applies to costs of a counterclaim (*d*) ; intervention under Ord. 12, r. 23 (*e*) ; interpleader proceedings (*f*) ; application for new trial by married woman plaintiff (*g*). The order is, it seems, not made as of course, but the onus is on the married woman to show why it should not be made (*h*). Unless the trustees are parties, the order can only be enforced by the appointment of a receiver (*i*) ; the proper course in dismissing the action of a married woman is to make the costs payable out of her separate estate (*k*), with liberty to apply for a receiver over property subject to a restraint (*l*).

Both the summons and order, in cases where the appointment is sought by way of equitable execution, should specify the property over which the receiver is sought, for the receiver will not be appointed over the debtor's property generally (*m*). It appears that the debtor may be examined under the provisions of Ord. 42, rr. 32 and 33, in order to ascertain the nature of the

Form of
order.

(*a*) *Hollington v. Dear* (1895), W. N. 35.

(*b*) *Moran v. Place*, [1896] P. 214.

(*c*) *Gordon v. Gordon*, [1904] P. 163.

(*d*) *Hood Barrs v. Cathcart*, [1895] 1 Q. B. 873.

(*e*) *Crickitt v. Crickitt*, [1902] P. 177.

(*f*) *Nunn & Co. v. Tyson*, [1901] 2 K. B. 487.

(*g*) *Dresel v. Ellis*, [1905] 1 K. B. 574.

(*h*) *Pawley v. Pawley*, *infra*,

q.v. for form of notice of motion.

(*i*) *Re Peace*, 24 C. D. 405.

(*k*) *Paget v. Paget*, [1898] 1 Ch. p. 477.

(*l*) *Pawley v. Pawley*, [1905] 1 Ch. p. 594. It seems that in the K. B. D. the application for a receiver should be made in the first instance to a master: *Bagley v. Maple*, 27 Times Rep. 284. For form of order, see Seton, 7th ed., p. 849.

(*m*) *Hamilton v. Brogden* (1891), W. N. 14.

Chap. III. property (n). Any special directions as to keeping accounts of different property should be inserted in the order. Where the debtor was entitled to rent of furniture and a house let together, of which the house was in mortgage, the receiver was as against the mortgagee held entitled to rent apportioned to the furniture (o).

COMPANIES.

In the case of ordinary limited companies questions can rarely, if ever, arise as to whether the property is or is not assignable. In the case of statutory undertakings, the extent to which a receiver can be appointed over the assets has been discussed in a previous section (p).

If certain specific assets are excluded from the debentureholder's charge, they must be excluded from the order appointing a receiver. In a case in which different sets of debentures specifically charged certain items and all sets included a floating charge over the undertaking, different receivers were appointed over the respective specifically charged assets and one of them was appointed manager (q). The practice where foreign property is included is discussed on a previous page (r).

It is the practice to exclude uncalled capital from a receivership order, even though it is included in the charge given by the debentures (s).

(n) *Hamilton v. Brogden* (1891), W. N. 14. See also *Morgan v. Hart*, per Phillimore, L.J., [1914] 2 K. B. p. 191.

(o) *Hoare v. Hove Bungalows*, 56 Sol. Jo. 686, C. A.

(p) Chapter II., p. 59.

(q) See *Re Ind Coope & Co.*, [1911] 2 Ch. 223.

(r) See p. 131.

(s) See p. 141, and p. 276 as to duties of receiver in such a case.

If there is a doubt as to the property over which the debenture-holder's charge extends a summons may be issued for an inquiry to bring out the relevant facts (t) ; in the meantime the receiver may be ordered to carry to a separate account property as to which the doubt exists.

When debentures charge all the property and assets of a company, including its uncalled capital, the order appointing a receiver usually directs that all books and documents relating to such property and assets be handed over to the receiver. But, if the company is wound up, the liquidator is entitled to the custody of such books and documents as relate to the management and business of the company and are not necessary to support the title of the holder of the debentures, and the court will order the delivery of these books and documents to the liquidator, on an undertaking by him to produce them to the receiver (u). The court has no power to order securities which have been deposited in the Land Registry Office to be delivered up to a receiver in a debenture-holder's action, unless such securities have been redeemed or sold (x). Where title deeds are in the custody of trustees for debenture holders the court may, for reasons of convenience, order them to be handed over to a receiver for the debenture holders on his undertaking to redeliver them ; there is no hard-and-fast rule, the matter being one for the discretion of the court in each case (y).

(t) *Re Gregory, Love & Co.*, [1916] 1 Ch. 203.

(x) *Somerset v. Lands Securities Co.*, [1894] 3 Ch. 464.

(u) *Engel v. South Metropolitan Brewing Co.*, [1892] 1 Ch. 442.

(y) *Re Ind Coope & Co.*, 26 Times Rep. 11.

CHAPTER IV.

WHO MAY BE APPOINTED RECEIVERS.

Chap. IV. A RECEIVER appointed in an action should, as a general
Generally. rule, be a person wholly disinterested in the subject-matter (a); but it is competent to the court, upon the consent of the parties, and in a proper case without such consent (b), to appoint as receiver a person who is mixed up in the subject-matter of the action, if it is satisfied that the appointment will be attended with benefit to the estate (c). Accordingly, in an action to dissolve a partnership, one of the partners is often appointed receiver (d). In an urgent case the plaintiff has been appointed on his *ex parte* application (e). So, also, a mortgagee in possession has been appointed receiver (f); and, in a modern Irish case, the owner of incumbered lands which had been directed to be sold was appointed, the incumbrancers consenting, to be receiver, but no receiver's fees were allowed him (g). Where the appointment is by way of equitable execution it is not unusual to appoint the judgment creditor without salary (h).

(a) See *Re Lloyd*, 12 Ch. D. 11 Q. B. D. 711.
451.

(b) See p. 151, *post*.

(c) See *Boyle v. Bettwys*
Llantwit Colliery Co., 2 Ch. D.
726: unpaid vendor appointed.

(d) See p. 143.

(e) *Taylor v. Eckersley*, 2
Ch. D. 302; *Hyde v. Warden*,
1 Ex. D. 309; *Fuggle v. Bland*,

(f) *Re Prytherch*, 42 Ch. D.
590; and see *Davis v. Barrett*,
13 L. J. Ch. 304.

(g) *Re Golding*, 21 L. R. Ir.
194.

(h) See Annual Practice, n. to
Ord. 50, r. 16; and *Pawley v.*
Pawley, [1905] 1 Ch. 593.

A party to the action will not usually be appointed receiver unless he undertakes to act without salary (i), though in partnership cases salary is sometimes allowed (k). Chap. IV.
"Part-
ner ap-
pointed."

When a party to the action is appointed receiver, he does not thereby lose any privilege belonging to him as such party (l), nor are his rights as receiver affected by his liabilities as a party (m).

The appointment of a party as receiver without the consent of the other parties is most frequently made in partnership cases, because in such cases it is likely to be for the benefit of the estate: if the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the court sometimes appoints him receiver and manager without a salary (n). It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for moneys received by him (o). And where the appointment of a receiver is referred by the judge to the Master, leave is frequently given for each partner to propose himself.

The mortgagee of a West Indian estate, who did not take possession, would not be appointed consignee, unless he had stipulated for that advantage (p). Mortgagee
of West
Indian
estate not
appointed
consignee.

(i) *Re Prytherch*, 42 Ch. D. 590; *Wilson v. Greenwood*, 1 Swa. p. 483; *Hoffman v. Duncan*, 18 Jur. 69; *Sargant v. Read*, 1 Ch. D. 600. 1 K. & J. 501; *Hoffmann v. Duncan*, 18 Jur. 69 (retired partner liable for debts); *Sargant v. Read*, 1 Ch. D. 600.

(k) See *Davy v. Scarth*, [1906] 1 Ch. 55.

(l) *Scott v. Platel*, 2 Ph. p. 230.

(m) *Davy v. Scarth*, *supra*.

(n) *Wilson v. Greenwood*, 1 Sw. 483; see *Maund v. Allies*, 4 M. & C. 507; *Sheppard v. Oxenford*,

(o) *Wilson v. Greenwood*, 1 Sw. 471; *Blakeney v. Dufaur*, 15 Beav. 44; *Sargant v. Read*, 1 Ch. D. 600; *Collins v. Barker*, [1893] 1 Ch. 578.

(p) *Cox v. Champneys*, Jac. 576; see *ex parte Pincke*, 2 Mer. 452.

Chap. IV. It is not according to the usual course of the court to
 "Trustee." appoint a trustee to be receiver. As a general rule, a person who is invested with the power, and charged with the duty, of acting as a trustee, and is directly connected with the management of the estate, will not be appointed receiver (*q*). The court, on appointing a receiver of a trust estate, looks to the trustee to see that the receiver is doing his duty. The *cestui que trust*, if he is to have a receiver, is entitled to the superintendence of the trustee as a check (*r*). The two characters of trustee and receiver are rarely compatible, and, in addition to this, the appointment of a trustee to act as receiver is, unless he undertakes to act without remuneration, a violation of the fundamental rule of equity that a trustee cannot derive any benefit from the discharge of his duty as trustee (*s*). The court will even remove a receiver whose private interests are in conflict with his duties, notwithstanding that his acts may for the most part have been for the general good of the property, and that a majority in number and value of the incumbrancers on it may desire that he be retained (*t*). The rule against appointing a trustee to be a receiver applies whether he is a sole trustee or is acting jointly with others (*u*).

In special cases, however, where the appointment of a trustee to be receiver will be beneficial to the estate, as, for instance, where he has a peculiar knowledge of the estate, or no one else can be found who will act with the same benefit to the estate, the court will make the

(*q*) *Sutton v. Jones*, 15 Ves. at pp. 587, 588.

(*r*) *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 587.

(*s*) *Ib.*

(*t*) *Fripp v. Chard Railway*, 11 Ha. 241, 260; cf. *Cookes v. Cookes*, 2 D. J. & S. at p. 530.

(*u*) *Anon. v. Jolland*, 8 Ves. 72.

appointment. But, although there is no inflexible rule Chap. IV. that a trustee can only be appointed receiver upon the terms of his having no remuneration (*x*), he will generally be required by the court to undertake to act, if appointed, without any remuneration (*y*). Upon this undertaking a testamentary guardian and executor in one case (*z*), and in another case a tenant for life who was also a trustee, was appointed to act as receiver (*a*).

Where a trustee is willing to act as receiver without salary, he will be allowed to propose himself, but the judge is not bound to accept him (*b*). The court will not appoint a trustee to be receiver, even though he be ready to act without remuneration of any kind, if he is the person who ought to check the receiver for the benefit of the persons beneficially interested (*c*).

Under very special circumstances a trustee may be appointed receiver with a salary. Where, for instance, a testator had appointed as trustee of his estates a person who for many years had been the paid receiver and manager of them, he was continued as receiver with a salary, on the ground of the tenant for life being an infant (*d*).

The objection to the appointment of a trustee, who has active duties to perform in relation to the trust estate, to be receiver over it, does not apply to the case of a trustee to preserve contingent remainders, or with powers

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|---|------|--|------|
| (<i>x</i>) <i>Re Bignell, Bignell v. Chapman</i> , [1892] 1 Ch. 59. | 463. | (<i>b</i>) <i>Banks v. Banks</i> , 14 Jur. | 659. |
| (<i>y</i>) <i>Sutton v. Jones</i> , 15 Ves. | 584; | (<i>c</i>) <i>Sutton v. Jones</i> , 15 Ves. | 584. |
| <i>Pilkington v. Baker</i> , 24 W. R. 234. | | (<i>d</i>) <i>Bury v. Newport</i> , 23 Beav. | 30. |
| (<i>z</i>) <i>Gardner v. Blane</i> , 1 Ha. 381. | | | |
| (<i>a</i>) <i>Powys v. Blagrove</i> , 18 Jur. | | | |

K.R.

Chap. IV. of sale and exchange which cannot be immediately exercised (e). A trustee with power to lease will, however, as a general rule, be regarded as disqualified for appointment to the office of receiver (f).

Party in a
fiduciary
position,
&c.

The rule, that the court will not sanction the appointment as receiver of a person whose duty it is to check and control the receiver, is extended to other persons besides trustees (g). Thus it has been held that, as it is the duty of the next friend of an infant to watch the accounts and check the conduct of a receiver of the infant's estate, the two characters are incompatible with each other (h); and in *Taylor v. Oldham* (i) Lord Eldon held that the son of a next friend ought not to be receiver. Upon similar grounds it has been held that the solicitor of a party having the conduct of an action cannot be appointed receiver, because it will be his duty to check the receiver's accounts (k).

Nor will a man be appointed receiver whose position may cause difficulty in administering justice. Accordingly, a Master in Chancery was disqualified from being appointed a receiver, for, he being an officer whose duty it was to pass the accounts and check the conduct of a receiver, his appointment to be receiver was open to objection on very obvious grounds (l). The same reason which disqualified a Master in Chancery from being receiver applies to the appointment of a person who acts as solicitor

(e) *Sutton v. Jones*, 15 Ves. 587.

(f) *Ib.*

(g) See *Cookes v. Cookes*, 2 D. J. & S. 530.

(h) *Stone v. Wishart*, 2 Madd.

64. The guardian is, however, sometimes appointed receiver:

see Seton, 7th ed., p. 951.

(i) Jac. 527, 529.

(k) *Garland v. Garland*, 2 Ves. Jr. 137; *Wilson v. Poe*, 1 Hog. 322; cf. *Grundy v. Buckeridge*, 22 L. J. Ch. 1007.

(l) *Ex parte Fletcher*, 6 Ves. 427.

under a commission of lunacy (*m*). There can be no doubt that it also applies to a Master of the Supreme Court, who is attached to the Chancery Division of the High Court of Justice. Chap. IV.

Although a solicitor in an action (*n*), or a solicitor under a commission of lunacy (*o*), cannot be appointed receiver of the estate in relation to which he is acting as solicitor, there is no general objection to the appointment of a solicitor to be receiver (*p*). In *Bagot v. Bagot* (*q*) the solicitor of a married woman was, on her application, appointed receiver of her separate estate, although a strong affidavit was made by her husband, seeking to show the unfitness of the solicitor for the office.

The person appointed to be receiver ought to be one who, consistently with his professional and other pursuits, can spare sufficient time for the duties of his office, and the court will attend to circumstances tending to show that the person appointed as receiver is unable to fulfil this condition (*r*). Accordingly, in a case where a man proposed as receiver was a member of Parliament and a practising barrister, and also resided at a very considerable distance from the estate, the court held that these circumstances, though not amounting to an absolute disqualification, formed sufficient grounds to render further consideration advisable (*s*). There is no objection to the appointment as receiver of a practising barrister who is not a member of Parliament (*t*). Considerations looked to in making the appointment.

(*m*) *Ex parte Pincke*, 2 Mer. 322; *Della Cainea v. Hayward*, 452. M'Clell. & Y. 272.

(*n*) *Garland v. Garland*, 2 Ves. (q) 2 Jur. 1063.

Jr. 137; *Re Lloyd*, 12 Ch. D. 449. (*r*) *Wynne v. Lord Newborough*,

(*o*) *Ex parte Pincke*, 2 Mer. 15 Ves. 284.

452. (*s*) *Ib.* 283.

(*p*) See *Wilson v. Poe*, 1 Hog. (*t*) *Ib.*

Chap. IV. The court will not appoint as receiver a person whose
 Peer. privileges protect him from the ordinary remedies which
 it may become proper to enforce (*u*). A peer, accordingly,
 is disqualified (*x*). Lord Eldon would not say that a
 Member of House of Commons. member of the House of Commons was absolutely dis-
 qualified (*y*), but the considerations which render the
 appointment of a peer objectionable appear to apply also
 to the case of a member of the House of Commons (*z*).

Account- A person who is under security to the Crown is not a
 ant to Crown, proper person to be appointed a receiver. Accordingly,
 &c. in an old case, the Master in Chancery rightly rejected
 a person proposed for appointment as receiver of the trust
 estates of a charity, upon finding that he was receiver-
 general for the county of Cambridge; for, he having in
 that capacity given security to the Crown, if he were to
 become indebted to the Crown and also to the charity, the
 Crown might by its prerogative process sweep away all his
 property, with the result that his debt to the charity
 would be lost (*a*). Upon the same principle it is con-
 ceived that the appointment of any person being in the
 position of an accountant to the Crown would be open to
 objection (*b*).

If the person to be appointed receiver is not named
 by the court at the hearing, the party having the conduct
 of the proceedings proposes the name of a person on the
 hearing of the summons to proceed on the order (*c*),

(*u*) *Att.-Gen. v. Gee*, 2 V. & B.
 208.

(*x*) *Ib.*

(*y*) *Wynne v. Lord Newborough*,
 15 Ves. 284.

(*z*) See *Long Wellesley's Case*,
 2 R. & M. 639; *Lechmere Charl-
 ton's Case*, 2 M. & C. 316; *Re*

Armstrong, Ex parte Lindsay,
 [1892] 1 Q. B. 327.

(*a*) *Att.-Gen. v. Day*, 2 Madd.
 246, at p. 254.

(*b*) *Dan. Ch. Pr.*, 8th ed.,
 1470-2.

(*c*) See *post*, p. 170.

and supports his application by evidence as to the fitness of the person proposed. If the affidavit as to fitness is misleading the receiver will be discharged (*d*). Chap. IV.

If the person proposed as receiver is objectionable, any party interested in the proceedings may propose that some other person be appointed. A stranger to the action cannot propose a receiver (*e*). The proposal must come from a party interested (*f*). The most fit person should be appointed, without regard to the party by whom he has been proposed (*g*). In making the selection the circumstances of the case and the interests of all parties must be taken into consideration (*h*); but, other things being equal, that is, if the parties are equally interested, and the persons proposed on both sides are unobjectionable, the person proposed by the party having the conduct of the proceedings is usually preferred (*i*). In the appointment of a receiver, considerable attention will be given to the recommendations of a testator (*k*).

If an estate over which a receiver is to be appointed is in mortgage, preference will be given to the person proposed by the mortgagee, unless there is some substantial

(*d*) *Church Press, Ltd.* [1917] W. N. 39.

(*e*) *Att.-Gen. v. Day*, 2 Madd. 246.

(*f*) *Ib.*; *Bagot v. Bagot*, 2 Jur. 1063.

(*g*) *Lespinasse v. Bell*, 2 J. & W. 436.

(*h*) *Wood v. Hitchings*, 4 Jur. 858. If a married woman desires a receiver over her separate estate, she may appoint whom she pleases. An affidavit by her husband, that the person pro-

posed by her is unfit, cannot be attended to: *Bagot v. Bagot*, 2 Jur. 1063.

(*i*) *Wilson v. Poe*, 1 Hog. 322; see *Baylies v. Baylies*, 1 Coll. 548; *Bord v. Tollemache*, 1 N. R. 177. Where a receiver had been appointed in two administration suits, the carriage was given to the plaintiff who first gave notice of motion: *Hart v. Tulk*, 6 Ha. 611.

(*k*) *Wynne v. Lord Newborough*, 15 Ves. 283.

Chap. IV. objection to him, although a person proposed by the mortgagor may be more experienced in the duties of the office. It has been said to be an indulgence on the part of a mortgagee of an estate to suffer the owner of the equity of redemption to appoint a receiver (*l*).

A party to the action may propose himself as receiver, if leave to that effect is given and embodied in the judgment or order (*m*). If leave to that effect is not embodied in the judgment or order, a party to the action cannot propose himself (*n*). The judge in chambers can, however, give leave, if the question has not been disposed of in court. If the leave has been refused, a subsequent order giving the leave may, in a proper case, be obtained on summons at chambers (*o*).

Under the old practice of the Court of Chancery, when the appointment of a receiver rested with the Masters in Chancery, it was a settled rule not to entertain any objection to the report of the Master which was not founded on principle (*p*). The court would not interfere with the discretion of the Master in the appointment of a receiver, unless some substantial objection could be shown to the appointment (*q*). Under the present practice

(*l*) *Wilkins v. Williams*, 3 Ves. 588; *Tillett v. Nixon*, 25 Ch. D. 239; see, too, *Bord v. Tollemache*, 1 N. R. 177, where the deed contained a provision for the appointment of a receiver by the first mortgagee, and the suit for the appointment of a receiver was instituted by a second mortgagee.

(*m*) *Meaden v. Sealey*, 6 Ha. 620; *Cookes v. Cookes*, 2 D. J. &

S. 526; Seton, 7th ed., pp. 729, 739.

(*n*) *Davis v. Duke of Marlborough*, 2 Sw. 118.

(*o*) See, for a form of summons, Dan. C. F., 6th ed., 905; see Dan. Ch. Pr. 477.

(*p*) *Cookes v. Cookes*, 2 D. J. & S. 530.

(*q*) *Tharp v. Tharp*, 12 Ves 317.

the Court of Appeal acts on the principles on which the court acted when the old practice was in force, and accordingly will not entertain an application bringing in question the decision of the judge as to the most fit person to be appointed receiver, unless the appointment is open to some overwhelming objection in point of choice, or some objection fatal in point of principle (r). Chap. IV.

It is a substantial objection to the appointment of a receiver that he has an undue partiality for one of the parties (s); but if an order has been made, without any objection on the part of any of the parties, giving liberty to one of the parties to propose himself as receiver, the question is one not of principle, but of judicial discretion with regard had to all the circumstances of the case; and, if the judge appoints the party proposing himself, the Court of Appeal will not interfere with that selection (t). The mere fact of the existence of disputes or differences between the parties to an action does not debar the judge from appointing a party to the action to be receiver, where leave to propose himself has been given to that party by the judgment or order (u).

Where a receiver has been appointed, the court will not remove him on the mere ground of his being an illiterate person, in the absence of some weightier reason, such as mismanagement, dishonesty, or incompetency to manage the estate (x).

(r) *Cookes v. Cookes*, 2 D. J. & S. 530; *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 421; *Nothard v. Proctor*, 1 Ch. D. 4.

(s) *Blakeway v. Blakeway*, 2 L. J. Ch. N. S. 75.

(t) *Cookes v. Cookes*, 2 D. J. & S. 526, at p. 532.

(u) *Cookes v. Cookes*, 2 D. J. & S. at p. 531.

(x) *Chaytor v. Maclean*, 11 L. T. O. S. 2.

Chap. IV.

COMPANIES.

It is only in special circumstances that the court will appoint the plaintiff in a debenture-holder's action receiver, and then only, as a rule, subject to production of an affidavit that all the other debenture holders consent (y). A director will not as a rule be appointed. In *Re Carshalton Park Estate, Ltd.* (z) a chartered accountant resident near Birmingham was appointed receiver and manager of a company, the assets of which were a building estate near London, though the appointment of the managing director was desired by another debenture holder. But one of the persons entrusted with powers of management over a statutory undertaking will sometimes be appointed : thus, in *Ames v. Birkenhead Docks* (a), the chairman of the trustees of a dock company was appointed receiver of the tolls of the company. Similarly, in *Potts v. Warwick and Birmingham Canal Company* (b), one of the committee of management of a company was appointed receiver of the tolls of the company.

Liquida-
tor.

Where an application is made to the court by debenture holders to appoint a receiver, and an application is also made to appoint a liquidator, it is a rule of convenience that the court will take care, in order to avoid trouble and expense, that the receiver and the liquidator shall be one and the same person in every case where that can properly be done (c). Accordingly where, after the making of an order to wind up a company and the appointment of a liquidator, the appointment of a receiver is applied for by the plaintiffs in a debenture-holder's

(y) See *Budgett v. Improved
Furnace Syndicate*, [1901] W. N.
23.

(z) [1908] 2 Ch. p. 66.

(a) 20 Beav. 332.

(b) *Kay*, 143.

(c) *Re Joshua Stubbs*, [1891] 1
Ch. 475, at p. 482.

action, the liquidator will, as a general rule, be appointed Chap. IV. receiver (d), unless there are special circumstances in the case rendering it undesirable that he should be appointed, e.g., if he has assumed a position of hostility to the debenture holders (e). If the judge of first instance has come to the conclusion that there are such circumstances, the Court of Appeal will not overrule the exercise of his discretion (f).

A receiver who has been appointed before the commencement of the winding-up of a company is not displaced *ipso facto* by the appointment of a liquidator; but the court will usually remove a receiver appointed before the commencement of the winding-up proceedings, or after a winding-up order has been obtained, and appoint the liquidator to act as receiver as well as liquidator, on the ground that the liquidator can, by virtue of the powers vested in him under the Companies Acts, collect and get in the outstanding calls more expeditiously and less expensively (g). This, however, is "only a *primâ facie* rule of practice; if justice or convenience require it, the rule will be displaced" (h). And it will be displaced if there is only a small amount of unpaid capital to be got in. In such a case the court

(d) *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 420; *Tottenham v. Swansea Zinc Ore Co.* (1884), W. N. 54; 53 L. J. Ch. 776.

(e) *Giles v. Nuthall* (1885), W. N. 51; see, too, *Boyle v. Bettws, &c., Colliery Co.*, 2 Ch. D. 726; and *Strong v. Carlyle Press*, [1893] 1 Ch. 268.

(f) *Giles v. Nuthall* (1885), W. N. 51.

(g) *Campbell v. Compagnie*

Générale, 2 Ch. D. 181.

(h) *British Linen Co. v. South American and Mexican Co.*, [1894] 1 Ch. 108, *per* Vaughan Williams, J., p. 119; *Bartlett v. Northumberland Avenue Hotel Co.*, 53 L. T. 611. In the former case the receiver was allowed to continue to act in respect of certain assets particularly difficult to realise.

Chap. IV. will generally abstain from substituting the liquidator for a receiver, and will allow the receiver to continue to act (i). And if the assets of the company are not enough to pay the debenture holders, the court will not remove the receiver in favour of a liquidator who wishes to question the validity of the debentures (k).

Where debenture holders have a right under their security to appoint a receiver, a winding-up order coupled with the appointment of a liquidator does not interfere with this right, though it may prevent the receiver from doing various things which he was authorised to do by the debenture deed, for instance, carrying on the business or making a call. There is no case in which the court has appointed the liquidator to act as receiver for debenture holders, except where the debenture holders have themselves come to the court and asked for a receiver. In that case the court, in the exercise of its discretion, will generally appoint the liquidator, as being the most suitable person. But where, under the terms of their security, the debenture holders have a right to appoint their own receiver, and they come to the court insisting on their right, they are entitled to an order giving their receiver liberty to take possession. In such a case the court has no discretion. In *Re Henry Pound, Son, and Hutchins* (l) leave was given to a receiver appointed by a company's debenture holders to take possession of the company's property notwithstanding the appointment of a liquidator, without prejudice to any question as to the receiver's powers, other than the

(i) *Re Joshua Stubbs*, [1891] 1 Ch. 475, 483. See, too, *Re Vimbos, Limited*, [1900] 1 Ch. 470, where all the assets, which were of considerable amount, were realised by a receiver

appointed by debenture holders shortly before the company went into liquidation.

(k) *Strong v. Carlyle Press*, [1893] 1 Ch. 268.

(l) 42 Ch. D. 402.

power to take possession of and to sell the property (*m*). Chap. IV.
 But a power of appointing a receiver conferred by a company's debentures must be exercised *bonâ fide* in the interest of the debenture holders only, and accordingly, in a case in which it had been exercised by the donee of the power, a debenture holder who was also a shareholder, in the interest of the shareholders, the court interfered and appointed its own receiver (*n*) ; and so also where the appointment was made by means of the vote of a person who had assigned his debentures to the plaintiff and against the wishes of the latter (*o*).

Where a judge of first instance has, in the exercise of his discretion, refused to displace a receiver by a liquidator, the Court of Appeal will not, in the absence of special circumstances to justify their so doing, interfere with the exercise of that discretion (*p*).

Where the receiver is not displaced, a question may arise between him and the liquidator as to the custody of the books of the company. A case has already been referred to (*q*), in which an order dealing with such a question was made.

Where an application is made to the court to appoint a receiver on behalf of the debenture holders or other creditors of a company, the official receiver may be so appointed (*r*).

(*m*) 42 Ch. D. 402.

(*n*) *Re Maskelyne British Type Writer*, [1898] 1 Ch. 133.

(*o*) *Re Slogger Automatic Feeder Co.*, [1915] 1 Ch. 478.

(*p*) *Re Joshua Stubbs*, [1891] 1 Ch. 475 ; *Bartlett v. Northumberland Avenue Hotel Co.*, 53 L. T. 611.

(*q*) *Engel v. South Metropolitan Brewing Co.*, [1892] 1 Ch. 442,

cited *supra*, p. 141.

(*r*) Companies (Consolidation) Act, 1908, s. 162 ; see *Deacon v. Arden*, 50 L. T. 584, where the official receiver, who contended that he ought to be substituted for a receiver who had been appointed in a foreclosure action before the bankruptcy of the mortgagor, was ordered to be made a defendant.

CHAPTER V.

MODE OF APPOINTMENT OF A RECEIVER.

Chap. V. EXCEPT in certain statutory cases (*a*), and in cases of lunacy (*b*), the court has no jurisdiction to appoint a receiver unless an action is pending (*c*). The case of an infant forms no exception from the rule (*d*). In some cases the same person has been appointed guardian and receiver of the person and estate of an infant on petition or summons in chambers; and in other cases separate persons have been appointed guardian and receiver on summons in chambers (*e*). The more usual course, however, is to appoint a guardian of the person and estate without a receiver (*f*). The case of a lunatic is the only non-statutory exception from the rule that a receiver will not be appointed unless an action is pending. In the case of a lunatic a receiver may be appointed although no action is pending (*g*).

Receiver
not ap-
pointed
unless in
an action.

A receiver might, under the old practice, be appointed after an administration decree in a suit commenced by summons (*h*).

(*a*) In cases coming within the Railway Companies Act, 1867, *supra*, p. 68, or the Mortgage Debenture Acts, *supra*, p. 74, a receiver may be appointed on petition.

(*b*) See *supra*, p. 105.

(*c*) *Salter v. Salter*, [1896] P. 291.

(*d*) *Ex parte Mountford*, 15 Ves. 445, 449.

(*e*) *Re Leeming*, 20 L. J. Ch. 550; *Re Reynolds*, 19 L. T. 311;

and see Simpson on Infants, 3rd ed., pp. 352-363. The Lord Chancellor of Ireland has power under 5 & 6 Will. 4, c. 78, s. 7, to appoint a receiver over the estate of a minor upon petition: *Re Goode*, 1 Ir. Ch. 256.

(*f*) Seton, 7th ed., pp. 951 *et seq.*

(*g*) *Ex parte Whitfield*, 2 Atk. 315; and see *supra*, pp. 105-112

(*h*) *Brooker v. Brooker*, 3 Sm. & G. 475.

A proceeding by originating summons, taken out under Chap. V. R. S. C. Ord. 55, r. 3, being an action within the definition of that word in Ord. 71, r. 1, and the Judicature Act, 1873, s. 100 (i), a receiver may be appointed in an action properly commenced by originating summons (k).

Except in cases of equitable execution, an application for the appointment of a receiver must, as a rule, be made in open court. But where the appointment is by consent, the application for the appointment of a receiver may be made in chambers (l). Further, where the application is not an original application for the appointment of a receiver in the action, but is only an application to supply the place of a receiver already appointed, it should be made in chambers (m).

The application for a receiver is usually, except in cases of equitable execution, made on motion, but the appointment may be made on petition (n).

Where an action is commenced by originating summons, an application for a receiver may be made, either in chambers or in court, at any time after the service of the summons, and either before or after the making of an order corresponding to a judgment in an action commenced by writ (o). It is the more usual course, in the case of an action commenced by originating summons, to make the application by motion in court.

(i) *Re Fawsitt*, 30 Ch. D. 231.

(k) *Gee v. Bell*, 35 Ch. D. 160; *Barr v. Harding*, 36 W. R. 216; *Weston v. Levy* (1887), W. N. 76.

(l) *Blackborough v. Ravenhill*, 16 Jur. 1085; 22 L. J. Ch. 108.

As to practice on appointment, see *post*, pp. 170 *et seq.*, and Seton, 7th ed., p. 737.

(m) *Grote v. Bing*, 20 L. T.

124; 1 W. R. 80; 9 Ha. App. 50; *Booth v. Coulton*, 16 W. R. 683.

(n) See *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207.

(o) *Re Francke* (1888), W. N. 69; 57 L. J. Ch. 437.

Chap. V. A plaintiff should indorse his writ with a claim for a receiver, where to obtain the appointment of a receiver is a substantial object of the action (*p*); but a receiver may be appointed although not claimed by the indorsement on the writ (*q*).

Mode of application for receiver.

An application for a receiver may be made to the court or a judge by any party (*r*). Except in cases of application by way of equitable execution (*s*), usually by motion (*t*), often on short notice (*u*). It is provided by R. S. C. Ord. 50, r. 6, that, if the application is by the plaintiff, it may be made either *ex parte* or with notice, and, if it is by any other party, then on notice to the plaintiff and at any time after appearance by the party making the application. The rule does not state that an *ex parte* application may be made by a defendant, but it is conceived that, in an urgent case, a defendant may obtain the appointment of a receiver on such an application (*v*).

It is only in cases of emergency that a receiver is appointed by the court upon an *ex parte* application (*x*), even after judgment (*y*). If there is a risk of the respondent defeating the applicant's object by making away with the property on being served with notice of application for a receiver, the court will appoint a receiver

(*p*) *Colebourne v. Colebourne*, 1 Ch. D. 690; *Re Wenge*, [1911] W. N. 129.

(*q*) *Norton v. Gover* (1877), W. N. 206; *Salt v. Cooper*, 16 Ch. D. 544.

(*r*) See *Carter v. Fey*, [1894] 2 Ch. 541, for instances in which the application may be made by a defendant.

(*s*) See p. 159.

(*t*) For practice, see p. 164.

(*u*) See p. 164.

(*v*) See *Hicks v. Lockwood* (1883), W. N. 48.

(*x*) *Caillard v. Caillard*, 25 Beav. 512.

(*y*) *Lucas v. Harris*, 18 Q. B. D. 127, 134; *Re Potts*, [1893] 1 Q. B. 648; *Re Goudie*, [1896] 2 Q. B. 481; *Re Connolly Bros., Ltd.*, [1911] 1 Ch. p. 742.

ex parte (z). But if, in such a case, the applicant will be sufficiently protected, pending the hearing of the application, by an injunction, the court usually grants an interim injunction in preference to appointing a receiver *ex parte*. Chap. V.

Except in cases of equitable execution the application must be made to the judge in person. Practice on application for receiver by way of equitable execution.

Where the appointment of a receiver is sought by way of equitable execution, the application is made in the King's Bench Division and also in the Chancery Division (a) by summons in chambers (b). In the King's Bench Division a master (c) has jurisdiction by virtue of R. S. C. Ord. 54, r. 12 (e), to make the appointment and to grant an injunction so far as is ancillary or incidental to equitable execution, and the practice in the Chancery Division is similar (d). In such cases, if the plaintiff does not desire an injunction, he issues a summons without leave. If, for sufficient reason, he requires an interim injunction he applies *ex parte* to the Master for leave to issue the summons, which in that case asks for an interim injunction. The affidavit should state: (1) Date and particulars of the judgment, including particulars of any partial satisfaction; (2) particulars and result of any execution which has been issued, stating nature of sheriff's return; (3) if defendant has no property which can be taken by legal execution; reasons why legal execution

(z) *Evans v. Lloyd* (1889), W. N. 171; *Minter v. Kent, &c.*, *Land Society*, 72 L. T. 186.

(a) *Re Hartley* (1892), W. N. 49; see *Salt v. Cooper*, 16 Ch. D. 544; *Smith v. Cowell*, 6 Q. B. D. 75; for an instance where the application was by motion, see

Pawley v. Pawley, [1905] 1 Ch. 593.

(b) Form R. S. C. App. K. No. 61A.

(c) A district registrar has similar powers: Ord. 35, r. 6.

(d) See Annual Practice, nn. to Ord. 50, r. 16.

Chap. V. would be futile if he has such property (e) ; (4) particulars of the property over which a receiver is sought ; (5) name and address of proposed receiver, and that in deponent's judgment he is a fit and proper person ; and (6) that the defendant is in pecuniary difficulties [that the appointment of a receiver without the delay of giving security is of great importance], and that deponent verily believes that the defendant may assign or dispose of his interest in the [property] unless restrained from so doing by the order of the court (f). If the affidavit is sufficient, leave is given to issue a summons returnable in about seven days, and if the judge or master is satisfied by the affidavit that there is danger of the property being made away with by the judgment debtor an injunction will be granted pending the hearing of the summons in the form annexed to R. S. C. Appendix K. No. 61A ; a case of jeopardy must be established by the affidavit (g). Where the defendant has not appeared it is not sufficient to file the summons at the Central Office, it should be served on the defendant or leave obtained for substituted service (h).

The following departmental directions were issued on the 19th March, 1887, to the Summons and Order Depart-

(e) It is not necessary to prove that legal execution has been exhausted if it is shown that it would be futile: see *Hills v. Webber*, 17 Times Rep. 513.

(f) See *Annual Practice*, n. to Ord. 50, r. 16 ; and *Chitty*, F. 490.

(g) *Lloyds Bank v. Medway Upper Nav. Co.*, [1905] 2 K. B. 359. For an injunction granted in Ch. D., see *Westhead v. Riley*, 25 Ch. D. 413 ; and see *Archer*

v. Archer (1886), W. N. 66. For practice of granting injunctions in the Probate Division in lieu of a receiver, see *Bullus v. Bullus*, 102 L. T. 399.

(h) *Tilling v. Blythe*, [1899] 1 Q. B. 557. In practice, however, strict personal service is not insisted on if it is shown that the summons has come to the knowledge of the judgment debtor.

ment of the then Queen's Bench Division, as to orders Chap. V.
 appointing a receiver by way of equitable execution. They express the usual practice adopted by the judges in Chambers, as to the appointment of receivers where the judgment debt is small :

" 1. In all cases where the judgment for debt and costs is for more than £50 and less than £100, a direction is to be added to the order that the total amount to be allowed for the costs of the receiver (including his poundage, the costs of obtaining the appointment, of completing the security, passing his accounts, and obtaining his discharge) shall not exceed 10 per cent. (*i*) of the amount for which the judgment is signed (*k*).

" 2. Where the judgment for debt and costs is for a less sum than £50, then the usual clause as to security is omitted, and in cases where the receiver is not the plaintiff, the plaintiff is made (by the order) answerable for the acts and defaults of the receiver, but he shall not receive more than the amount of his judgment debt, and allowed costs of obtaining this order without leave of the court or first giving (at the plaintiff's own cost, unless otherwise ordered) the usual security to the satisfaction of the Master. (The leave here referred to can only be given by the judge.) The costs of the order are not to exceed £4.

(*i*) Ord. 13, r. 14 of the County Court rules provides that the costs of appointment are not to exceed $2\frac{1}{2}$ per cent. of the debt and costs. Costs of injunction to preserve property pending a receiver cannot be added to the costs for purposes of this calculation: *Carrington*

v. Deane, [1917] 1 K. B. 717.

(*k*) This 10 per cent. rule has been held to apply where a judgment debt of £115 1s. 6d. had been reduced by payment to £45 15s. 2d. before the receiver was appointed (see *Ann. Pr.*, nn. to Ord. 50, r. 16).

Chap. V. “*Note*.—In the case of personal property, unless under special circumstances, it is required to be shown that the property of which it is proposed to appoint a receiver cannot be seized under a *fi. fa.*” (*l*).

A county court judge has jurisdiction to appoint a receiver by way of equitable execution over an equitable interest in land (*m*).

An action in the Chancery Division by a creditor who has recovered judgment in the King’s Bench Division is *prima facie* so vexatious as to render him liable for the costs of such second action ; but if the mere appointment of a receiver will not give the judgment creditor the remedy to which he is entitled, *e.g.*, where there are accounts to be taken between him and the judgment debtor, or if it is necessary to take proceedings in the name of the person having the legal right to sue, the action for a receiver may properly be brought in the Chancery Division (*n*).

Parties. The appointment of a receiver is subject to the ordinary rule that equitable relief can only be granted when the proper parties are before the court (*o*). If the application is by incumbrancers prior incumbrancers need not, but all subsequent incumbrancers and the person entitled to the ultimate equity of redemption should be made parties, though the order for a receiver may be made in the absence of some of the subsequent incumbrancers (*p*). A creditor, for instance, who has obtained judgment against a debtor

(*l*) See further as to practice, Annual Practice, nn. to Ord. 50, r. 16. If the defendant is a married woman a further paragraph is added to the order limiting the power of the receiver to such of her property as is not subject to a restraint on anti-

pation.

(*m*) *R. v. Selfe*, [1908] 2 K. B. 121.

(*n*) *Proskauer v. Siebe* (1885). W. N. 159.

(*o*) See *Re Shephard*, 43 Ch. D. 131.

(*p*) See p. 183.

in an action against the debtor and another, cannot, Chap. V. after the death of the debtor, obtain an order appointing a receiver of the interest of the deceased debtor in real estate for the purpose of satisfying the judgment debt (q). In cases of emergency, however, a receiver may sometimes be appointed after the death of a sole defendant; thus where in a creditor's action against an executrix for administration, judgment had been pronounced, and a summons for the appointment of a receiver had been taken out, but pending the summons the executrix died, and there was evidence that the estate needed immediate protection, the court, on the application of the plaintiff, appointed a receiver, with powers limited in duration until ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtaining the appointment of himself or some other person as such administrator, and to accept short notice of motion to discharge the receiver (r). In a similar case the order was made where the death of the sole executor occurred after judgment (s).

The executors of a deceased plaintiff who has recovered judgment cannot apply for the appointment of a receiver under R. S. C. Ord. 42, r. 23, as such an appointment is not execution within the meaning of that rule and rule 8 (t).

(q) *Re Cave* (1892), W. N. 142; *Re Shephard*, *supra*; *quære Waddell v. Waddell*, [1892] P. 226.

(r) *Cash v. Parker*, 12 Ch. D. 294. See, too, *Taylor v. Eckersley*, 2 Ch. D. 302; *Evans v. Lloyd* (1889), W. N. 171; *Piperno v. Harmston*, 3 T. L. R.

219. In a proper case the court will, on *ex parte* motion, appoint a receiver upon the death of the former receiver: *Re Stone*, Ir. R. 9 Eq. 404; see, too, *Johnson v. Bayley*, Seton, 7th ed., p. 729.

(s) *Re Clark*, [1910] W. N. 234; see p. 27, *ante*.

(t) *Norburn v. Norburn*, [1894]

Chap. V. A receiver may, under very special circumstances, be appointed even before the service of the writ in an action (*u*). Leave may be obtained, in cases where the circumstances are urgent, to serve¹ the defendant with notice of motion for a receiver along with the writ, or at any time after service of the writ and before the expiration of the time limited for appearance (*x*): but the fact of such leave having been obtained must be mentioned in the notice of motion (*y*). In such cases, in the interests of fairness, copies of affidavits proposed to be used on the motion should be served with the writ (*z*). The notice of the motion must be served on the defendant personally or upon his solicitor (*a*): it cannot be filed at the Central Office under R. S. C. Ord. 67, r. 4, in default of appearance (*b*). The order may be granted on affidavit of service of the notice of motion (*c*). Leave to serve a defendant with notice of motion for a receiver before appearance does not include leave to give short notice of motion. Short

1 Q. B. 448; see *Thompson v. Gill*, [1903] 1 K. B. 770. *Seemle*, they should apply to be added as parties under Ord. 17, r. 4, before applying for a receiver.

(*u*) *Re H.'s Estate*, *H. v. H.*, 1 Ch. D. 276; Seton, 7th ed., p. 737.

(*x*) R. S. C. Ord. 52, r. 9.

(*y*) *Hill v. Rimell*, 8 Sim. 632; 2 My. & Cr. 641; *Jacklin v. Wilkins*, 6 Beav. 608.

(*z*) *Paravicini e Sucrì v. L. C. H. Gunner*, [1919] W. N. 173.

(*a*) *I.e.*, the solicitor on the record: see *Bagley v. Maple*, 27 Times Rep. 284.

(*b*) *Tilling v. Blythe*, [1899] 1 Q. B. 557. If, however, leave has been obtained to serve a notice of motion before appearance, Ord. 67, r. 2 does not apply: where service on one of two defendants who resided together and who entered appearances shortly after (both having been served personally with the writ), of a copy for the other of notice of motion for an injunction, was held sufficient service on the latter: *Jarvis v. Hemmings*, [1912] W. N. 33.

(*c*) *Meaden v. Sealey*, 6 Ha. 620.

notice of motion cannot be given without express leave for that purpose (*d*), and it must appear upon the face of the notice of motion that leave has been obtained to serve it as short (*e*). Leave may be obtained to serve notice of motion for a receiver with an originating summons (*f*). Chap. V.

The two clear days referred to in R. S. C. Ord. 52, r. 5, mean working days, excluding Sundays (*g*). A notice of motion stating it is to be moved before the judge of the Chancery Division to whom it is assigned is good, though, owing to the system of linked judges, it is moved before another judge and respondent does not appear (*h*).

The rule which requires previous notice to be served on a defendant who has not appeared is subject to an exception, where the defendant has absconded to avoid service and his residence is unknown (*i*). Under the old practice it was held to be also subject to an exception where the defendant was out of the jurisdiction and could not be served (*k*). But inasmuch as, under the present practice, an order may in many cases be made for service of the writ or notice summons (*l*) in an action on a party who is out of the jurisdiction (*m*), a receiver will only, it is conceived, be appointed by the court before service, where a party whose interest is sought to be

(*d*) Ord. 52, r. 5; and see *Hart v. Tulk*, 6 Ha. 611.

(*e*) *Dawson v. Beeson*, 22 Ch. D. 504.

(*f*) *Smeed, &c. Co. v. Cumberland*, 31 Sol. J. 659.

(*g*) *Brammall v. Mutual Ins. Corp.*, [1915] W. N. 78.

(*h*) *Re Madame Romney, Ltd.*, [1915] W. N. 389. Cf. *Jackson*

v. Webster, [1920] W. N. 295.

(*i*) *Dowling v. Hudson*, 14 Beav. 423; *London and South-Western Bank v. Facey*, 19 W. R. 676.

(*k*) *Tanfield v. Irvine*, 2 Russ. 149; *Gibbins v. Mainwaring*, 9 Sim. 77.

(*l*) R. S. C. Ord. 11, rr. 1 and 8A.

(*m*) R. S. C. Ord. 11.

Chap. V. affected by the judgment is out of the jurisdiction if the case is urgent, or where service is impossible (n) or his residence is unknown.

If a defendant has made an affidavit in the action, he will be considered to have appeared, although no formal appearance has been entered for him, for the purpose of the appointment of a receiver (o).

Receiver appointed at any stage of action.

The application for a receiver may be made at any stage of an action, according as the urgency of the case may require (p). Where proceedings are already pending, an order for a receiver may be made in those proceedings without any fresh action being brought (q).

Under the old practice a receiver was not appointed before decree, unless the bill prayed such appointment, and leave to amend would not generally be given (r). But although, under the new practice, if the appointment of a receiver is a substantial object of the action, the writ ought to be so indorsed, still the indorsement may be amended under R. S. C. Ord. 38, r. 1, and upon such amendment the appointment of a receiver may be obtained (s).

Receiver appointed at hearing, though not prayed for.

A receiver might, under the old practice, be appointed at the hearing, although not prayed for by the bill, if the facts stated were sufficient to warrant the appointment, and the urgency of the case required it (t). And under the present practice the court has the same power of

(n) See *Brown v. Blount*, 2 R. & M. 83.

(o) *Vann v. Barnett*, 2 Bro. C. C. 158.

(p) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 287; *Bryant v. Bull*, 10 Ch. D. 153.

(q) *Re Peace and Waller*, 24

Ch. D. at p. 407.

(r) *Pare v. Clegg*, 7 Jur. N. S. 1136; 9 W. R. 216.

(s) *Colebourne v. Colebourne*, 1 Ch. D. 690.

(t) *Osborne v. Harvey*, 1 Y. & C. C. 116.

appointing a receiver at the trial of an action as it has Chap. V.
 on an interlocutory application in it (*u*). A receiver might also, under the old practice, be appointed on motion after decree, in cases of urgency (*x*). For instance, a receiver was appointed after decree in a case where a person, not a party to the cause, had been so long in possession without accounting that there was danger of his acquiring an absolute title by adverse possession (*y*). So, a receiver was appointed after decree in a case where a mortgagee in possession had not shown clearly that anything was due upon his mortgage, and the next estate, being a life estate, was in danger of being lost by the delay, and the possible inability of the first mortgagee to refund if he should be ordered to do so (*z*). So, also, a receiver was appointed after decree in a case where the application could not have been made at the hearing (*a*), and in a case where it appeared by the report that the circumstances would, at the hearing, have entitled the applicant to a receiver (*b*). So, also, a receiver was appointed in a case where, after a decree for sale of land, the defendant, by neglecting to bring in the title-deeds, was preventing the plaintiff from obtaining the benefit of the decree (*c*).

The application for a receiver might, under the old practice, be granted after decree, although it had previously been refused, if a state of facts entitling the

(*u*) *Re Prytherch*, 42 Ch. D. 590.

(*x*) *Wright v. Vernon*, 3 Drew. 112.

(*y*) *Thomas v. Davies*, 11 Beav. 29.

(*z*) *Hiles v. Moore*, 15 Beav. 175.

(*a*) *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207.

(*b*) *Att.-Gen. v. Mayor of Galway*, 1 Moll. 94, 104.

(*c*) *Shee v. Harris*, 1 J. & L. 91; see, too, *Hacket v. Snow*, 10 Ir. Eq. 220.

Chap. V. applicant to a receiver were made to appear on the proceedings in the cause (*d*). A receiver might also be appointed after decree, although by the decree further consideration generally (*e*), or some question between the plaintiff and a particular defendant, was reserved (*f*). But, if no subsequent circumstances had occurred, rendering the appointment of a receiver necessary for the protection of the estate or otherwise, a receiver would not, generally, be appointed after decree (*g*).

Receiver
after judg-
ment.

Applica-
tion for
receiver
by de-
fendant.

Under the present practice a receiver may be appointed after judgment (*h*).

Under the old practice a defendant could not apply for a receiver before decree (*i*). And indeed, in *Lloyd v. Passingham* (*k*), where the defendants were in possession under a legal title, the court refused a motion by the plaintiffs for a receiver before the hearing, founded upon evidence which had been taken in the cause. But, under the new practice, a defendant may apply for a receiver before judgment (*l*), even though the plaintiff has already served notice of motion for the like purpose. In such a case one order will be made on the two motions, but the conduct of the proceedings will generally be given to the plaintiff (*m*). A receiver may be appointed on an *ex parte* application by a defendant who has

(*d*) *Att.-Gen. v. Mayor of Galway*, 1 Moll. 95, 104.

(*e*) *Hiles v. Moore*, 15 Beav. 175.

(*f*) *Cooke v. Gwynn*, 3 Atk. 689.

(*g*) *Wright v. Vernon*, 3 Drew. 121.

(*h*) *Anglo - Italian Bank v. Davies*, 9 Ch. D. 286 ; see, too, *Bryant v. Bull*, 10 Ch. D. 153.

See *ante*, p. 159, as to practice where receiver is sought by way of equitable execution.

(*i*) *Robinson v. Hadley*, 11 Beav. 614.

(*k*) 3 Mer. 697.

(*l*) *Porter v. Lopes*, 7 Ch. D. 358.

(*m*) *Sargant v. Read*. 1 Ch. D. 600.

appeared to the writ (*n*). But in all these cases the relief sought by the defendant must be incidental to or arising out of the relief sought by the plaintiff: if he desires any other relief, he must deliver a counter-claim, or issue a writ in a cross-action, before he can apply for a receiver (*o*). Chap. V.

An application for a receiver must be supported by evidence showing that the appointment is necessary or expedient (*p*), and if a named person is to be appointed by an affidavit of fitness (*q*). If a statement of claim has been delivered and the application is made before judgment, the affidavits ought to be founded on the allegations in the statement of claim, and, if statements not so founded are introduced into the affidavits, the court may decline to attend to them (*r*). In an Irish case, decided in the year 1845, the court refused to grant the plaintiffs' application for a receiver on the ground of an equity, appearing on the answer, which had not been relied upon in the bill (*s*). Affidavits.

If the applicant satisfies the court of the fitness of his nominee (*t*), or if the parties are *sui juris* and agree upon a proper person, the court will at once insert his name in the order; otherwise the person to fill the office is selected in proceedings in the judge's chambers (*u*). Nomination of receiver.

(*n*) *Hick v. Lockwood* (1883), W. N. 48.

(*o*) *Carter v. Fey*, [1894] 2 Ch. 541.

(*p*) See *Middleton v. Dodswell*, 13 Ves. 269. As to form of affidavit where the appointment is sought by way of equitable execution, see p. 159.

(*q*) Form Dan. C. F. 6th ed., 906. If the affidavit of fitness is misleading the receiver will

be discharged: *Re Church Press, Ltd.*, [1917] W. N. 39; see this case as to necessity for correctly describing deponent.

(*r*) See *Dawson v. Yates*, 1 Beav. 306.

(*s*) *Cremen v. Hawkes*, 2 J. & L. 674.

(*t*) See *ante*, Chapter IV.

(*u*) *Anderson v. Kemshead*, 16 B 329.

Chap. V. A person appointed to act as receiver must, unless
 Security to be given. otherwise ordered, first give security, to be allowed by the court or a judge, duly to account for what he shall receive as such receiver, and to pay the same as the court shall direct (x).

Practice on appointment. If the applicant makes out a case for the appointment of a receiver the court may either (1) order that a proper person be appointed receiver (y); or, if the applicant satisfies the court of the fitness of his nominee, (2) appoint such nominee by name subject to his giving security before the order is drawn up; or (3) appoint such nominee, upon his first giving security; or (4) appoint such nominee with liberty to act at once and ordering him to give security by a fixed day (z), the applicant undertaking to be responsible for what he may receive or become liable for in the meantime, the order in this case providing that, if security is not given within the time limited, or such time as the court or judge may allow, the appointment is to determine on the expiration of such period (a); or (5) appoint such nominee without security.

No person named in order. The procedure in the Chancery Division (b) differs

(x) R. S. C. Ord. 50, r. 16. *Re Pountain*, 37 Ch. D. 609; see, as to receivers in lunacy, the Rules in Lunacy, 1892, rr. 83, 84. A receiver appointed in an action in the Chancery Division commenced in a district registry (other than the Manchester and Liverpool registries, as to which see Ord. 35, r. 6A) must give security in London, where, it seems, he must also pass his accounts, unless the order otherwise directs (see *Re Capper*, 26 W. R. 434); in K. B. actions the receiver both gives security and passes his accounts in the registry.

(y) See *Anderson v. Kemshead*, 16 Beav. 345; *Lane v. Lane*, 25 Ch. D. 66; *Tillett v. Nixon*, ib., 238.

(z) Usually three weeks.

(a) Resolution of Chancery judges (n) to *Re Sims and Woods*, [1916] W. N. 233; *Rowley v. Desborough*, [1916] W. N. 152.

(b) As to practice in Divorce, see p. 182.

somewhat according to the form in which the appointment is made. In the first case, *i.e.*, where the person to act as receiver is not named in the order, the order is drawn up and a copy brought into Chambers; a summons to proceed is taken out, and it is therein asked that a named person be appointed receiver (*c*); the summons is supported by an affidavit as to the fitness of the person proposed (*d*): any party to the proceedings may propose a person to be receiver. The Master then appoints the person who is to act, the matter being adjourned to the judge if desired. The latter's decision is final unless a question of principle is involved (*e*). The Master also fixes the amount of security (*f*) and the times for the receiver to bring in his accounts, with directions as to the disposal of any balances (*g*). A separate order with the appointment is drawn up on the completion of the security. Chap. V.

In the second case (where a named person is appointed subject to his giving security) the procedure is the same as in the previous case, except that of course no proceedings are necessary for naming the receiver. In both cases, as soon as the security is completed, the Master makes a certificate (*h*) to that effect, the certificate also showing the times fixed for passing of the receiver's accounts and disposal of balances; if, however, the security is given by undertaking (*i*), no formal certificate is drawn up, but a note of the fact that security has been completed and of the periods fixed for passing the accounts

Named
person ap
pointed
subject to
his giving
security.

(*c*) Form Dan. C. F. 905 see
Dan. C. P. 477.

(*g*) Form Dan. C. F. 915.

(*h*) Form Dan. C. F., 6th ed.,

(*d*) *Re Joshua Stubbs, Ltd.*,
[1891] 2 Ch. 475.

915.

(*i*) As to when this is allow-
able, see p. 174.

(*e*) See p. 151.

(*f*) R. S. C. Ord. 50, r. 18.

Chap. V. and disposal of balances is endorsed on the duplicate order or written on the margin and signed by the Master (*k*).

Named person appointed subject to giving security before order drawn up. In the third case, where a named person is appointed subject to giving security before the order is drawn up (*l*); the cause or matter is adjourned to Chambers in order that security may be given, and the Registrar sends a note to the Master that the person named has been appointed, on giving security, to receive the specified property, and that the order will be completed on the Master furnishing a note of the security having been given and of the times fixed to bring in the accounts and for disposal of balances (*m*). A summons to proceed is then taken out to settle the security (*n*) and to fix times for bringing in the accounts and disposing of balances. As soon as the security is completed the Master sends a note to the Registrar that the receiver has given security, specifying the mode thereof and the periods fixed for bringing in accounts and disposal of balances (*o*), and the Registrar enters in the order the evidence of security having been given and completes the order.

Named person appointed with liberty to act at once and direction to give security by a day fixed. In the fourth case (where a named person is appointed with liberty to act at once with a direction to give security by a day fixed) the procedure is the same as in the second case, the completion of the security being certified by the Master. If any extension of time is required, a summons must be taken out before the time has expired, asking that the time may be extended; and the Master may extend the time, but will only do so in special circum-

(*k*) Stamp 2s. 6d.

916; see Dan. Ch. Pr., 8th ed.,

(*l*) R. S. C. Ord. 50, r. 17. See

1479.

Re Hoyland Colliery, 53 L. J. Ch. 352.

(*n*) See p. 173.

(*o*) Dan. C. F., 6th ed., 917;

(*m*) Form Dan. C. F., 6th ed.,

Dan. Ch. Pr., 8th ed., 1479.

stances. If the time fixed has expired before an extension Chap. V.
has been allowed, application must be made to the judge
in person to renew the appointment, which has lapsed (*p*).
It is to be observed that the undertaking to be given by
the applicant in this case must extend, not only to the
receiver's receipts but to all liabilities which would be
covered by the security when completed (*q*).

In the fifth case mentioned (where a person is appointed Person ap-
pointed
without
security.
without security) a summons to proceed is taken out for
fixing the times for bringing in accounts and disposal of
balances only (*r*).

Upon the return of the summons to settle the security Practice
on giving
security.
the party having the conduct of the proceedings brings
into Chambers evidence showing the nature and value of
the property over which the receivership is to extend (*s*).
The amount at which security is fixed by the Master is
usually double the amount of the annual rental or yearly
value of the estate to be collected (*t*). Where debts on
outstanding estate are to be got in, security is given to the
full, or something beyond the full, amount which is
ordered or expected to be received. With a view of
reducing the amount for which security is to be given,
part of the estate may be ordered to be paid into court
and security required only for the remainder (*u*). With
the same view the receiver may be restricted from getting
in mortgage debts.

(*p*) See p. 170.

(*q*) *Re Debenture-Holders' Ac-
tions*, [1900] W. N. 58; as to
previous practices, see *Evans v.
Lloyd* (1889), W. N. 171; *Re
Patrick*, 85 L. T. 398.

(*r*) As to when the appoint-
ment is made without security,

see p. 176.

(*s*) Form of affidavit, Dan. C.
F., 6th ed., 906; see Dan. Ch. Pr.,
8th ed., 477.

(*t*) *Seton*, 741.

(*u*) *Poole v. Wood*, *Seton*,
741; *ex parte Clayton*, 1 Russ.
476; *Re Eagle*, 2 Ch. 701.

Chap. V. If the amount of security exceeds £2000 the security is given by the recognisance (*x*) of the receiver and two personal sureties, or more usually by the recognisance of the receiver and the bond of the receiver and a guarantee society : as a general rule the same society is not accepted for more than £25,000. If the amount does not exceed £2000 but is above £500, the bond only of the receiver and his sureties is required (*y*). If the amount does not exceed £500 the security may be given by an undertaking signed by the receiver and his sureties or surety, in the case of a guarantee society the bond being sealed with its seal or otherwise duly executed (*z*). Both the bond and the recognisance are given to the two Senior Masters of the judge to whom the cause or matter is assigned.

Each of the personal sureties is responsible for the full amount of the security fixed and must make an affidavit that he is worth such amount after payment of all his just debts and liabilities (*a*). If any doubt is alleged to exist as to the solvency of the sureties, the opposing solicitor may attend at the time for acknowledging the recognisance and examine the sureties on these points (*b*).

In the case of a guarantee society or company, the secretary makes an affidavit showing its assets and liabilities, and that it is empowered to guarantee (*c*) that

(*x*) Form Dan. C. F., 6th ed., 907, 916 ; see Dan. Ch. Pr., 8th ed., 475, 1478.

(*y*) Form Dan. C. F., 6th ed., 909.

(*z*) R. S. C. Ord. 50, r. 16A ; form of undertaking, R. S. C. App. L. 21A ; Dan. C. F., 6th ed., 913.

(*a*) Form of affidavit, Dan. C. F., 6th ed., p. 914.

(*b*) Smith on Rec. 18 : the partner of the receiver, or persons in trade together or the solicitor in the action, are usually rejected.

(*c*) For a case where this power was doubted but eventually accepted as valid by C. A., see *Re Spiritine*, [1902] W. N. 124.

all claims and demands have been duly satisfied, and as to the mode of execution of the bond : an affidavit is dispensed with in the case of an undertaking, which is accepted from those societies whose bond is usually taken. The security of a Scottish guarantee company may be accepted, if the company submits by its bond to the jurisdiction and signs an address for service within the jurisdiction (*d*). There is no rule of practice prohibiting the acceptance of the bond of a foreign company in a proper case (*e*).

The recognisance and bond are settled by the Master (*f*), and engrossed on paper. The bond is executed in the same way as a deed, and the recognisance taken before some person authorised to administer oaths (*g*). An undertaking is not settled by the Master and is written on paper, or the form (*h*) can be obtained from the guarantee company or at Room 2, Royal Courts of Justice (East Entrance), and filled up.

The recognisance is not chargeable with any stamp duty, which on the bond is ten shillings where the amount recoverable exceeds £300 (*i*) ; on the undertaking, if under hand, stamp is sixpence, if under seal, ten shillings.

The recognisance bond or undertaking must be filed in the central office, a receipt being given by the proper officer (*k*).

It is not regular to take, as security for a receiver, an

(*d*) Resolution of judges of
Chancery Division, 5th July,
1909.

(*e*) *Aldrich v. British Griffin
Chilled Iron and Steel Co.*, [1904]
2 K. B. 850.

(*f*) Form of memorandum,

Dan. C. F., 6th ed., 907.

(*g*) R. S. C. Ord. 50, r. 16.

(*h*) R. S. C. App. L. 21A.

(*i*) Or 2s. 6d. per cent. on
that amount or less.

(*k*) Dan. Ch. Pr., 8th ed., 1479.

As to vacating, *post*, p. 353.

Chap. V. assignment of a mortgage belonging to him (l) instead of the usual security. A transfer of Government stock, however (m), and the security of a guarantee society (n), will be accepted as security for a receiver.

Where a person resident in Ireland was appointed receiver by the court here, the security taken was a judgment confessed by him and his sureties in the Court of King's Bench there in favour of the Master of the Rolls and the senior judge of the Chancery Division here, and such judgment was duly docketed and registered there, so as to give a lien on the real estates of the receiver and sureties (o).

Where the property over which a receiver has been appointed has increased in value during the receivership, additional security has been required to be given by him (p). Upon any event, such as death or bankruptcy, happening which would prevent the recognisance being effectually put in force against the sureties, an order will be made at chambers, on summons, directing the receiver to give a new security (p).

Dispensing with security.

The court will not in ordinary cases dispense with the usual security, even with the consent of the parties interested (q). But if all the parties interested are competent, and agree, to appoint a receiver of their own authority and not by the authority of the court, the court may allow him to act even without recognisance (r). In a case where a testator had by his will directed that a

(l) *Mead v. Lord Orrery*, 3 Atk. 237.

(m) *Betagh v. Concannon*, Smith on Rec., p. 17.

(n) *Colmore v. North*, 42 L. J. Ch. 4.

(o) Seton, 4th ed., 427.

(p) Seton, 7th ed., p. 742.

(q) *Manners v. Furze*, 11 Beav. 30.

(r) *Manners v. Furze*, 11 Beav. 31.

named person should be appointed receiver of his real and personal estates, stating that he intended by the appointment to give him a pecuniary benefit, the court appointed that person to be receiver and agent of the estates (the testator's only real estate being in the West Indies) on his own personal recognisance only (s); and even in a case where all the parties were not competent to consent, the circumstance that the person proposed for receiver had been employed by the testator to manage his estates was held to be a reason for dispensing with sureties, and appointing him receiver of the estates on his own personal recognisance only (t). But in *Tylee v. Tylee* (u) the court declined to dispense with the usual security, some of the parties being not *sui juris*, and, therefore, incapable of giving consent.

It is not unusual, where no salary is given to the receiver, to dispense with the security (x). So, security may be dispensed with where the party appointed receiver will only have to incur expenditure (y). So, also, security was dispensed with where the order appointing a receiver was made merely for the purpose of creating a charge upon the debtor's property subject to prior incumbrances, and the receiver was not to go into possession or receive anything (z). In the King's Bench Division where the

(s) *Hibbert v. Hibbert*, 3 Mer. 681.

(t) *Carlisle v. Berkeley*, Amb. 599; see, too, *Wilson v. Wilson*, 11 Jur. 793.

(u) 17 Beav. 583.

(x) *Gardner v. Blane*, 1 Ha. 381; *Re Prytherch*, 42 Ch. D. 590; see, too, 24 W. R. 234.

(y) *Hyde v. Warden*, 1 Ex. D.

309, at p. 310; *Boyle v. Bettus Llantwit Colliery Co.*, 2 Ch. D. 726; *Fuggle v. Bland*, 11 Q. B. D. 711.

(z) *Hewett v. Murray* (1885), W. N. 53; 54 L. J. Ch. 573. For form of order appointing a receiver by way of equitable execution without security, see S. C. 52 L. T. 380.

Chap. V. judgment debt is small, even though over £50, security is usually dispensed with, on the judgment creditor undertaking responsibility for default of the receiver.

Interim
receiver
without
security.

In urgent cases, where there is evidence of immediate danger to the property, and there is no time for the receiver to complete his security, an interim receiver may be appointed without security for a limited period, or until a receiver is appointed under a reference to Chambers for that purpose, upon the undertaking of the person so appointed interim receiver, if he be the plaintiff, not to deal with the property except under the direction of the court, and to abide by any order which the court may think fit to make as to damages or otherwise (a); the applicant must enter into an undertaking as to damages and for receipts of the receiver, and must undertake that the receiver will give an enforceable security and preserve the property intact (b).

Security
in King's
Bench
Division.

In the King's Bench Division the security is given by bond, with the proper Inland Revenue stamp (c), and the penalty is generally fixed at twice the amount of the gross annual income of the property, or twice the amount of the capital money (if any) likely to be paid to the receiver. There must also be an attendance for the purpose of allowing the sureties and settling the form of the bond, and (unless the surety is one of the usually accepted societies) the usual affidavit of justification must be made by the sureties, and a certificate must be given by the solicitors of the judgment creditor that the sureties are

- (a) *Taylor v. Eckersley*, 2 L. T. 398; as to debenture-holders' actions, *post*, p. 184.
 Ch. D. 302; 5 Ch. D. 741; *Cash v. Parker*, 12 Ch. D. 293. (c) 2s. 6d. per cent. up to £300; over this amount 10s. irrespective of amount.
 (b) *Evans v. Lloyd* (1889), W. N. 171; *Re Patrick*, 85

respectable and credible persons (*d*). Certain guarantee companies are accepted as sureties, and indeed any guarantee company proof of whose responsibility is given to the satisfaction of the Master. The bond is usually given to two of the Masters of the Supreme Court (*e*). It should be left with the Master with 2s. 6d. stamp affixed, for transmission to the General Filing Department. A certificate with 2s. 6d. stamp of security being completed may be endorsed on the order appointing a receiver (if the execution creditor desire it) and signed by the Master.

The appointment given by the Master for settling the security must be endorsed on the order appointing a receiver and must bear a 10s. stamp and be entered at Room 175 before being taken to the Master. Notice of the appointment should be given to the judgment debtor, in order that he may have the opportunity of objecting to the sureties or amount of security. If judgment was signed in default of appearance, the notice should be filed and a copy sent to the judgment debtor.

The order appointing a receiver either should state on the face of it the property over which the appointment is to extend or refer to the pleadings or some document in the proceedings which describes the property (*f*). In the case of mortgaged property, the description will follow the terms of the mortgage, and if the latter is in general terms the order will be so likewise. In the case of a

Form of
order as to
property.

(*d*) No stamp required. The costs of attending bondsmen and receiver, explaining bond, and on bondsmen on swearing affidavit of solvency ought to be allowed: *Prynn v. Turtle*, 101 L. T. Jo. 232.

(*e*) See the Annual Practice, nn. to Ord. 50, r. 16, where the regulations in the K. B. D. are fully stated. For form of bond, Chitty, F. 497, 501.

(*f*) Seton, 7th ed., p. 738.

Chap. V receiver by way of equitable execution, the property should be specified; the appointment will not be made over the debtor's equitable interests in general terms. The order usually directs the receiver to pass his accounts from time to time, and to pay the balances found due from him, as the judge shall direct (*g*), or directions to this effect may be given in Chambers.

If the appointment of a receiver is over real or leasehold estate, the order usually directs the parties to the record who are in possession, not as tenants but as owners, to deliver up to him the possession (*h*), or to attorn tenant to the receiver at an occupation rent (*i*); and an order directing possession to be given to the receiver may, in a proper case, be obtained even upon an interlocutory application (*k*).

If tenants are in possession of real or leasehold estates over which a receiver is appointed, the order should direct them to attorn, and pay their rents in arrear and the growing rents to the receiver (*l*), but this direction should be omitted where the estates are out of England or Wales (*m*).

If the property over which a receiver is appointed is outstanding personal estate, the order should direct the parties in possession of such estate to deliver over to the

(*g*) *Ante*, p. 171.

(*h*) *Griffith v. Griffith*, 2 Ves. Sen. 401; *Everett v. Belding*, 22 L. J. Ch. 75; 1 W. R. 44; *Hawkes v. Holland* (1881), W. N. 128; see as to form of order, *Davis v. Duke of Marlborough*, 2 Sw. 108, 116; *Baylies v. Baylies*, 1 Coll. 548; *Edgell v. Wilson* (1893), W. N. 145.

(*i*) *Re Burchnall*, *Walker v.*

Burchnall (1893), W. N. 171.

(*k*) *Ind, Coope & Co. v. Mee* (1895), W. N. 8; *Charrington & Co. v. Camp*, [1902] 1 Ch. 386. In *Taylor v. Soper* (1890), W. N. 121, 62 L. T. 828, North, J., refused in special circumstances to make an order for delivery up of possession before trial.

(*l*) *Seton*, 7th ed., p. 762.

(*m*) *Ib.*, p. 776

receiver all such estate, and also all securities in their hands for such estate or property, together with all books and papers relating thereto (*n*). Chap. V.

The costs incurred with reference to the completion of the security of the receiver, and subsequent thereto, are in the first instance paid by the receiver, and will be allowed him in passing his first account (*o*). But the premiums paid by the receiver to a guarantee society which has become his surety will not be allowed, unless he is acting without salary (*p*).

A receiver is sometimes appointed until judgment or further order, but very often no limit of time is fixed though a limit is always fixed in the appointment of a manager. Where no limit of time is fixed in the order appointing a receiver, it is not necessary for the judgment to direct that he be continued (*q*); but where he is appointed only until judgment or further order, if he is to continue to be receiver the judgment must so direct, and, as this is practically a new appointment, further security must be given (*r*), unless, as is usually the case, the security originally given is made applicable to any continuation of the appointment.

(*n*) Seton, 7th ed., p. 725; *Truman v. Redgrave*, 18 Ch. D. 547; *Leney & Sons, Ltd. v. Callingham*, [1908] 1 K. B. 79. If necessary, a receiver will be ordered to keep separate accounts of real and personal estates: *Hill v. Hibbitt*, 18 L. T. 553.

(*o*) Dan. Ch. Pr., 8th ed., p. 1492. As to costs where an ignorant person had been induced by the misrepresentations

of the plaintiff to consent to act as receiver, and afterwards, on discovering the nature of the office, refused to enter into the recognisance, see *Hunter v. Pring*, 8 Ir. Eq. 102.

(*p*) *Harris v. Sleep*, [1897] 2 Ch. 80.

(*q*) *Davies v. Vale of Evesham Preserves* (1895), W. N. 105; 43 W. R. 646.

(*r*) *Brinsley v. Lynton Hotel Co.* (1895), W. N. 53; 2 Manson, 244.

Chap. V. The practice on the appointment of a receiver by the
 Divorce. court in divorce is similar to that in the Chancery Division. The application is made on summons before a registrar on affidavit of service of the order for payment and of non-payment: the summons may be served on the respondent's solicitor or service dispensed with and substituted service of the order of appointment by registered letter or advertisement allowed. An injunction may be granted *ex parte* on the applicant's undertaking and the summons adjourned for service. The appointment is made of a named receiver "on his first giving security to the satisfaction of the registrar unless otherwise directed by the court." The bond is prepared by the applicant and left at the registry: if it has not been approved by the respondent an appointment is taken to settle. The registrar then signs his name on the margin of the bond and the order is issued (s).

COMPANIES.

Form of application. In the case of mortgages the practice as to mortgagees generally is applicable (t). In the case of debentures the application for a receiver is made by notice of motion (u), in a debenture-holder's action (x); leave to serve the notice with the writ being usually obtained as the applica-

(s) Powell and Oakley on Divorce, pp. 185-89, *q.v.* for forms.

(t) See *ante*, p. 34. A debenture holder is a necessary party to an action to enforce his security by a legal mortgagee: *Wallace v. Evershed*, [1899] 1 Ch. 891.

(u) For form, see Dan. C. F., 6th ed., 810.

(x) As to practice in such actions, see Dan. C. F., 6th ed., p. 809; Dan. Ch. Pr. 1235; Annual Practice, Pt. II.; Seton, 1953-73; Palmer, 11th ed., Vol. III., 480 *et seq*

tion is urgent. The action should be commenced by writ, though an order for foreclosure may be made on originating summons at the instance of debenture holders (y). The plaintiff sues on behalf of himself and all other debenture holders of the same series and should specify as accurately as possible the class on behalf of which he sues (z). The company and a member of each class of debenture holders, subsequent to the series of the plaintiffs, on behalf of such class, being made defendants (a). A receiver may however be, and often is, appointed before all the subsequent debenture holders are parties or represented (b). If subsequent debentures are secured by a trust deed, the trustees of that deed, having regard to Ord. 16, r. 8, sufficiently represent the debenture holders (c). Where there is a debenture trust deed to secure the plaintiff's series, the trustees should be made defendants if not plaintiffs (d).

It is a common practice for a motion for a receiver to be, by consent, treated as a motion for judgment where all parties are present, and the order for the usual accounts and inquiries then made. On such a motion the company (or liquidator) ought not to consent to a declaration of charge (e).

The County Court of Cornwall has exclusive jurisdiction Stan-
naries.

(y) *Oldrey v. Union Works*, 72 L. T. 627; *Sadler v. Worley*, [1894] 2 Ch. 170.

(z) *Marshall v. South Staffordshire Tramways*, [1895] 2 Ch. 36.

(a) Being added if necessary under Ord. 16, r. 11.

(b) *E.g., Re Crigglestone Coal Co.*, [1906] 1 Ch. 523.

(c) *Re Wilcox & Co., Ltd.*, [1903] W. N. 64.

(d) See *Cox v. Dublin City Distillery*, [1917] 1 Ir. R. 203.

(e) *Re Gregory, Love & Co., Ltd.*, [1916] 1 Ch. p. 209; unless perhaps in special circumstances the indefeasible nature of the charge is absolutely clear: *ib.*

Chap. V. in the case of companies formed for working metalliferous mines in Cornwall (*f*).

Effect of winding-up order.

After a winding-up order has been made, the action must be assigned to the judge having jurisdiction in winding-up; and if a winding-up order has been made after the commencement of the action, the judge having jurisdiction in winding-up may order transfer of the action to him (*g*). After a winding-up order leave to begin or continue the action must be obtained, but this will be given to incumbents as a matter of course (*h*).

Form of order.

The practice on appointment as to security and generally is dealt with in the earlier part of this chapter (*i*). It is of primary importance to complete security within the time fixed, or the appointment lapses (*k*).

In March, 1900, it was announced by Stirling, J., on behalf of all the judges of the Chancery Division of the High Court, that the undertaking given by the plaintiff in a debenture-holder's action, on the appointment of a receiver who is to act at once, is to be so framed as to extend to all liabilities which would be covered by the security when completed, and not only to the receiver's

(*f*) See *Dunbar v. Harvey*, [1913] 2 Ch. 530, and the Stannaries Acts, 1836, 1887, and s. 131 (4) Companies (Consolidation) Act, 1908; even though the memorandum authorises working elsewhere, if no such working has been carried on: *Re Radium Ore Mines*, 110 L. T. 57. The jurisdiction originally vested in the Vice-Warden of the Stannaries was transferred to the County Court of Cornwall by the Stannaries Court (Abolition) Act, 1896.

(*g*) See generally on practice, *Palmer's Comp. Prec.*, Vol. III., ch. 46, and *ante*, p. 79.

(*h*) S. 142, Companies (Consolidation) Act, 1908. This includes a supervision order, s. 203 (2): *Lloyd v. D. Lloyd & Co.*, 6 Ch. D. 339; *Re Wanzer, Ltd.*, [1891] 1 Ch. 305.

(*i*) As to statutory companies, see *ante*, p. 59.

(*k*) *Ante*, p. 170.

receipts (*l*). It had previously been held that, where the case is urgent and there is no time for the receiver to complete his security, the party moving the court must enter into an undertaking as to damages and for the receipts of the receiver (*m*), or must undertake that the person appointed receiver shall give such security as the court can enforce, that he will preserve intact the property of which he is appointed receiver (*n*).

The order also contains directions as to payment of preferential debts where the order is obtained by persons with a floating charge (*o*): as to description of property, see Chapter III. (*p*).

The court may in a proper case direct that the receiver do not give security nor take possession for a specified time (*q*).

(*l*) *Re Debenture-Holders' Actions*, [1900] W. N. 58.

(*m*) *Evans v. Lloyd* (1889), W. N. 171.

(*n*) *Re Patrick*, 32 Sol. J. 798; 85 L. T. 398.

(*o*) See *post*, p. 272, where this subject is fully treated.

(*p*) P. 152.

(*q*) *E.g.*, *Re Crompton & Co., Ltd.*, [1914] 1 Ch. p. 967.

CHAPTER VI.

EFFECT OF THE APPOINTMENT AND POSSESSION OF A RECEIVER.

Chap. VI. IN appointing a receiver the court takes possession, by the hands of its officer, of the property over which the receiver is appointed. A receiver duly appointed by the court is, from the date of his appointment, an officer and representative of the court (*a*); but he is not legally clothed with that character, or able to perform the duties of his office, until he has given security and his recognisance has been perfected (*b*).

When, however, as may be done in urgent cases, an interim receiver is appointed with liberty to act at once and a direction that he give security within a specified time, or if he is appointed without security, he becomes an officer of the court and is legally clothed with that character, from the date of his appointment (*c*), though in the former case the appointment lapses unless security is completed within the specified time (*d*). So, also, where the order appointing a receiver with power to take possession does not direct that he shall give security, and the receiver

(*a*) *Aston v. Heron*, 2 M. & K. 391; *Owen v. Homan*, 4 H. L. C. 1032; see *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Davy v. Scarth*, [1906] 1 Ch. 55; *Boehm v. Goodall*, [1911] 1 Ch. 155; *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

(*b*) *Defries v. Creed*, 34 L. J.

Ch. 607; *Edwards v. Edwards*, 2 Ch. D. 291; *Re Sims and Woods, Ltd.*, ante, p. 170. See, too, *Ridout v. Fowler*, [1904] 1 Ch. 658; affd., [1904] 2 Ch. 93.

(*c*) *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 741.

(*a*) Ante, p. 170.

takes possession accordingly, the appointment is complete, Chap. VI. even though he is subsequently continued as receiver by an order requiring security to be given (*e*). The means by which the receiver obtains possession are discussed in the following chapter (*f*).

The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional on the receiver's giving security, on registration operates as an immediate delivery of the land in execution; and, when the security is afterwards given, the order relates back accordingly (*g*). But as regards personalty, it is settled that, when the order is in the form of appointing a receiver upon his giving security, his appointment is not effectual until the security is given. It is a conditional appointment, and the giving of security is a condition precedent (*h*). Accordingly, where, at the suit of an equitable mortgagee, an order was made that M. "upon his giving security be appointed receiver" of certain chattels, and afterwards, but before the security had been given or possession taken by M., some execution creditors of the mortgagor took the chattels in execution, it was held by the Court of Appeal that the taking of the chattels in execution was not a contempt of court (*i*).

The appointment of a receiver does not in any way affect the right to the property over which he is appointed. Right not affected by the appointment.

(*e*) *Morrison v. Skerne Iron-works Co.*, 60 L. T. 588; 33 Sol. J. 396.

(*f*) P. 237.

(*g*) *Ex parte Evans*, 13 Ch. D. 252; and see *Re Shephard*, 43 Ch. D. 133, and p. 212.

(*h*) *Per* Farwell, J., in *Ridout v. Fowler*, [1904] 1 Ch. 658, at

p. 662; *affd.*, [1904] 2 Ch. 93; and see *Fahey v. Tobin*, [1901] 1 Ir. R. 511.

(*i*) *Edwards v. Edwards*, 2 Ch. D. 291, explained in *Ex parte Evans*, 13 Ch. D. at p. 255. See, too, *Re Roundwood Colliery Co.*, [1897] 1 Ch. 373, at p. 393.

Chap VI. The court, in an action for a receiver, deals with the possession only, until the right can be determined, if the right is the matter in dispute between the parties, or until the incumbrances have been cleared off, if the appointment has been made at the instance of an incumbrancer. Where the right is the matter in dispute, the receiver merely holds the property for whoever may ultimately be held to be entitled to it. If the appointment has been made on the application of an incumbrancer, the court, when the incumbrance has been cleared off, restores the possession to him from whom it was taken. The title is in no way prejudiced, in theory or principle, by the appointment (*k*).

The possession of the court by its receiver is the possession of all parties to the action according to their titles (*l*). An executor may exercise his right of retainer out of assets in his hands when the appointment is made, though they have been handed to a receiver (*ll*), in respect of existing debts (*m*) but not out of money collected by the receiver.

As the rights of the parties to an action are not interfered with by the appointment of a receiver, the possession of the receiver cannot, of itself, be held to put the tenant out of occupation (*n*). The appointment by the court

(*k*) *Sharp v. Carter*, 3 P. W. N. S. 157.

379; *Skip v. Harwood*, 3 Atk. 564; *Wells v. Kilpin*, L. R. 18 Eq. 298; and see *Moss SS. Co. v. Whinney*, [1912] A. C. 254. Where an order for the discharge of a receiver has been made, and he continues in possession after the date of his discharge, his possession is the possession of the party entitled, *Horlock v. Smith*, 11 L. J. Ch.

(*l*) *Re Butler*, 13 Ir. Ch. 456; *Bertrand v. Davies*, 31 Beav. 436; see *Penney v. Todd*, 26 W. R. 502; *Moir v. Blacker*, 26 L. R. Ir. 378.

(*ll*) *Re Harrison*, 32 Ch. D. 395; *Re Jones*, 31 Ch. D. 440.

(*m*) *Re Beavan*, [1913] 2 Ch. 595.

(*n*) *Moir v. Blacker*, 26 L. R. Ir. 378.

of a receiver over the estate of a defendant does not change Chap. VI.
the correlative rights of landlord and tenant previously
subsisting between the defendant and his tenants, though
the court thereby acquires additional powers of enforcing
the landlord's rights (o).

Similarly, where a receiver is ordered to keep up policies
of insurance, the direction must be taken to be for the
benefit of all parties who, in the result, prove to be inter-
ested, and the outgoings must be borne accordingly (p).

If persons with paramount rights, who are not parties
to the action, are actually in possession of those rights, the
appointment of a receiver does not prejudice them in the
enjoyment of those rights (q). But if they are not actually
in possession, then, after a receiver has been appointed, they
must come to the court for leave to exercise those rights,
in which case their application cannot be refused (r).

Thus if a puisne incumbrancer obtains the appointment
of a receiver in an action to which a prior mortgagee is
not a party, and such prior mortgagee is not actually in
possession at the date of the order, the receiver can give
a good discharge for rents accrued due, until service by
the prior mortgagee of notice of motion for liberty to take
possession by himself or a receiver (s); it makes no
difference that the prior mortgagee has previous to the
order appointed a receiver who has never given notice
to the tenants (t). The prior mortgagee is only entitled to

Receiver
for puisne
incum-
brancer.

(o) *Commissioners of Church
Temporalities v. Harrington*, 11
L. R. Ir. 128.

(p) *Seymour v. Vernon*, 19
L. T. 58.

(q) *Evelyn v. Lewis*, '3 Hare,
472.

(r) See *Re Metropolitan Amal-*

gamated Estates, [1912] 2 Ch. 497.

(s) *Thomas v. Brigstocke*, 4
Russ. 64; *Preston v. Tunbridge
Wells Opera House*, [1903] 2 Ch.
323, 325. As to dates in this
report, see case next cited, p. 501.

(t) *Re Metropolitan Amalga-
mated Estates*, *supra*.

Chap. VI. rents paid or accruing after the date of service of his notice of motion for liberty to take possession (*u*).

If the order made on the application of the puisne incumbrancer expressly reserves the rights of prior mortgagees, a prior mortgagee may, without application to the court, give notice to the tenants to pay their rents to him (*x*), and a tenant paying to him in obedience to such notice is not guilty of contempt of court and can set up the payment against the receiver (*y*). The order appointing a receiver should preserve the rights of prior incumbrancers, but if it does not the receiver cannot be displaced at the instance of a prior incumbrancer without application to the court, nor is the prior incumbrancer entitled to rents received by the receiver before the date of his notice of motion (*z*). Thus notice by a mortgagee, not a party, to tenants to pay their rents to him, was held ineffective to give him any title to those rents against the receiver and the parties to the action in a case where the order appointing the receiver did not preserve the rights of mortgagees (*a*). For the appointment of a receiver is for the benefit of mortgagees only so far as they avail themselves of it (*b*). So if a mortgagee claiming under a title paramount to that under which the receiver has been appointed suffers the receiver to pay away the

(*u*) *Re Metropolitan Amalgamated Estates, supra*.

(*x*) *Underhay v. Read*, 20 Q. B. D. 209: this case appears to cover the point raised in *Re Metropolitan Amalgamated Estates, supra*.

(*y*) *Ib*.

(*z*) See *Re Metropolitan Amalgamated Estates, supra*.

(*a*) The suit was for establishing the will of the mortgagor: *Thomas v. Brigstocke*, 4 Russ. 65.

(*b*) *Gresley v. Adderley*, 1 Sw. 579; *Salt v. Lord Donegal*, L. & G. temp. Sug. 91; *Penney v. Todd*, 26 W. R. 502; (1878), W. N. 71. *Comp. Piddock v. Boulbee*, 16 L. T. 837.

surplus rents to the beneficial owner, or to apply them Chap. VI. for purposes other than the satisfaction of his security, he is not entitled to a retrospective account of rents and profits (c). Money in the hands of a receiver is not, as in the case of a sequestrator, "*in custodia legis*" (d).

Though a receiver appointed by an equitable mortgagee is entitled to rents as against a person obtaining a garnishee order, the equitable mortgagee himself obtains no priority by giving notice to tenants to pay their rents to him, nor by appointing a receiver who gives no notice to tenants (e).

Incumbrancers may or may not avail themselves of an order appointing a receiver by applying to him. If they apply to him, they will be paid their interest, or, if he refuses or neglects to pay them, they may complain to the court of such neglect or refusal; but if they omit to apply for the interest, it is to be presumed that they are satisfied with the security they have both for interest and also for principal. The court does not enforce payment upon them, nor does it set apart any portion of any rents and profits receivable by the receiver to answer unclaimed interest. The balance is paid in by him, and is carried to the credit of the action without any previous inquiry whether all incumbrancers have or have not been paid their interest (f). A direction given by the court to the receiver, to keep down the interest on incumbrances, has not the effect of an appropriation of any rents and profits receivable by him to that specific

(c) *Gresley v. Adderley*, 1 Sw. 579; *Thomas v. Brigstocke*, 4 Russ. 64; *Flight v. Camac*, 4 W. R. 664.

(d) *Re Hoare*, [1892] 3 Ch. 94; disapp. *Delaney v. Mansfield*, 1 Hog. 235.

(e) *Vacuum Oil Co. v. Ellis*, [1914] 1 K. B. 693.

(f) *Bertie v. Lord Abingdon*, 3 Mer. 567; *Penney v. Todd*, 26 W. R. 502; (1878), W. N. 71. *Comp. Piddock v. Boulbee*, 16 L. T. 837.

Chap. VI. purpose. It is given, in the case of a receivership of a testator's estate, without the least view to the interests of his real or personal representatives. It is given partly in justice to the incumbrancers, that they may not be injured by the act of the court in taking possession of rents and profits to which they had a right to resort for payment of their interest, and partly for the benefit of the estate itself, lest the incumbrancers, having their interest stopped, might be induced to take proceedings injurious to those who stand behind them (g).

Where a receiver has been appointed under an order directing interest on prior incumbrances to be kept down and has received rents with the knowledge of the first mortgagee, that mortgagee, upon afterwards taking possession, is entitled only to the rents in the receiver's hands, after deduction of the receiver's remuneration and expenses (h).

Interference with the possession of a receiver.

When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave (i). If anyone, whoever he be, disturb the possession of the receiver, the court holds that person guilty of a contempt of court, and liable to be imprisoned for the contempt (k).

(g) *Bertie v. Lord Abingdon*, 3 Mer. 567; see, too, *Flight v. Camac*, 4 W. R. 664. Comp. *Piddock v. Boulton*, 16 L. T. 837.

(h) *Davy v. Price* (1883), W. N. 226.

(i) *Angel v. Smith*, 9 Ves. 335; *Aston v. Heron*, 2 M. & K. 391; *Ames v. Birkenhead Docks*, 20 Beav. 353; *Defries v. Creed*, 34 L. J. Ch. 607. As to cases where a receiver has been appointed by a mortgagee under

powers contained in a deed or under the Conveyancing Act, 1881, see *Bayly v. Went* (1884), W. N. 197; 51 L. T. 765, and Chapter XIV.

(k) *Fripp v. Bridgewater, &c. Railway Co.*, 3 W. R. 356; *Lane v. Sterne*, 3 Giff. 629; *Ex parte Hayward* (1881), W. N. 115. See, too, *Dixon v. Dixon*, [1904] 1 Ch. 161, where an injunction restraining interference with a receiver and manager was applied

The court will not allow the possession of its receiver to be interfered with or disturbed by anyone, whether claiming by a title paramount to or under the right which the receiver was appointed to protect (*l*). But unless the receiver comes with clean hands he will not be granted an injunction to restrain any interference with him, for instance, by distress (*m*). A man who thinks he has a right paramount to that of the receiver must, before he presumes to take any step of his own motion, apply to the court for leave to assert his right against the receiver (*n*). If the receiver has done anything wrong, the party who has suffered the wrong must apply to the court which appointed the receiver, and he will get full justice done (*o*). In a case in which an action in the King's Bench Division was threatened by the owner of certain plant against a receiver appointed in a debenture-holder's action, to enforce a claim in respect of the user by the receiver of such plant, the court, upon motion in the debenture-holder's action, restrained any proceedings

Chap. VI.

for and granted. A libel on a business carried on by a receiver and manager appointed by the court is a contempt of court, and may be punished by the committal of the offender: *Helmore v. Smith*, 35 Ch. D. 449. As to form of order for committal for obstructing a receiver, see Seton; 7th ed., p. 454.

(*l*) *Evelyn v. Lewis*, 3 Ha. 475; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 114.

(*m*) *Jarvis v. Islington Borough Council*, 73 J. P. N. C. 323, where the court refused to

restrain a distress to recover a fine levied on a company (over the assets of which a receiver had been appointed) for selling adulterated milk, where the offence had been committed by the receiver himself.

(*n*) *Ib.*; *Hawkins v. Gathercole*, 1 Drew. 17; *Randfield v. Randfield*, 1 Dr. & Sm. 314; *Ex parte Cochrane*, L. R. 20 Eq. 282, and cases cited in note (*k*), *supra*.

(*o*) *Ex parte Day*, 48 L. T. 912.

Chap. VI. otherwise than by way of claim therein (*p*). And a receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession without the authority of the court. He, or the parties at whose instance he was appointed, should ask for the direction of the court as to how he ought to proceed (*q*).

It is immaterial that the order appointing a receiver may have been improper or erroneous. It is not competent for anyone to interfere with the possession of a receiver on the ground that the order appointing him ought not to have been made. It is enough that it is a subsisting order. Persons who feel aggrieved by an order of the court may take a proper course to question its validity, but while it lasts it must be obeyed (*r*).

The court requires and insists that application be made to it for permission to take possession of any property of which its receiver has taken, or is directed to take, possession. The rule is not confined to property actually in the hands of a receiver; for the court will not permit anyone, without its sanction and authority, to intercept or prevent payment to the receiver of any property within the territorial jurisdiction of the court which he has been appointed to receive, although it may not be actually in his hands (*s*). Where, however, the court

(*p*) *Re Maidstone Palace of Varieties*, [1909] 2 Ch. 283. A county court judge has no jurisdiction to order payment by a receiver out of assets of compensation due under the Workmen's Compensation Act, 1906: the application must be made to the court administering those

assets: *Homer v. Gough*, [1912] 2 K. B. 303.

(*q*) *Ward v. Swift*, 6 Ha. 312; *Ex parte Cochrane*, L. R. 20 Eq. 282.

(*r*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117.

(*s*) *Ames v. Birkenhead Docks*, 20 Beav. 353.

appoints a receiver over property out of the jurisdiction Chap. VI.
 the receiver is not put in possession of such foreign property by the mere order of the court (t). Something further has to be done, and, until that has been done in accordance with the foreign law, any person, not a party to the action, who takes proceedings in the foreign country for the purpose of establishing a claim upon the foreign property, is not guilty of a contempt of court on the ground of interference with the receiver's possession or otherwise. And, in reference to such proceedings, no distinction can be drawn between a foreigner and a British subject (u).

Any deliberate act, calculated to destroy property under the management of the court by means of a receiver and manager, is an interference with that receiver, although it may not induce the breaking of any contract. The object of the court is to prevent any undue interference with the administration of justice, and when anyone, whether a partner in a business, a party to the litigation, or a stranger, interferes with an officer of the court, it is essential for the court to protect that officer (x).

The rule, however, that the possession of a receiver may not be disturbed without leave, does not apply, so far at least as third persons are concerned, until a receiver has been actually appointed, and is in actual possession. It is not enough that an order has been made directing the appointment of a receiver. Until the appointment has been perfected, and the receiver is actually in possession, a creditor is not debarred from proceeding to execution.

(t) See *Re Huinac Copper Mines*, [1910] W. N. 218. *Dixon v. Dixon*, [1904] 1 Ch. 161, at p. 163. As to interference

(u) *Re Maudslay, Sons, & Field*, [1900] 1 Ch. 602, at p. 611. with business carried on by a receiver and manager, see p.

(x) *Per Swinfen Eady, J.*, in 192.

Chap. VI. The order appointing a receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected (*y*). An execution creditor may, therefore, seize chattels after an order has been made appointing a receiver on his giving security, but before the security has been given or possession taken (*z*). In the case of equitable execution or the appointment of a receiver for debenture holders, the order should if possible be obtained in a form to operate from its date.

Nor is there disturbance of a receiver unless the order for the appointment of a receiver states distinctly, on the face of it, over what property the receiver is appointed, so as to make known what the property is of which he is in possession (*a*). Hence, where a receiver was appointed "of the income of the outstanding trust property in the pleadings mentioned," and the receiver entered into and remained for several years in possession of certain real estate constituting that property, and the tenants attorned to him, an application to restrain the legal owner from proceeding against the tenants without the leave of the court was refused with costs. The appointment should have been expressed to be over the rents of the particular property, and should have been followed by a direction to the owner to deliver possession, or that the tenants should attorn (*b*).

Nor, again, was there disturbance of a receiver in a case where, the chairman of a railway company having been appointed receiver, a debenture holder, who had

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| (<i>y</i>) <i>Defries v. Creed</i> , 34 L. J. | 255, <i>per James</i> , L.J. |
| Ch. 607; <i>Edwards v. Edwards</i> , | (<i>a</i>) <i>Crow v. Wood</i> , 13 Beav. |
| 2 Ch. D. 291. | 271. |
| (<i>z</i>) <i>Ex parte Evans</i> , 13 Ch. D. | (<i>b</i>) <i>Ib.</i> ; <i>supra</i> , p. 180. |

recovered judgment against the company in respect of Chap. VI. arrears of interest, applied, under section 36 of the Companies Clauses Consolidation Act, 1845, for leave to issue execution against the chairman of the company to the extent of the money remaining due in respect of his shares; the money which would be reached by the execution in such a case being money in the hands of an individual shareholder, and not part of the undertaking or profits of the company, of which alone he had been appointed receiver (c).

Where a receiver has been appointed over the estate of a tenant for life, the remainderman is entitled, on the death of the tenant for life, to go into possession without making any application to the court (d).

To constitute disturbance of a receiver, it is not necessary that the person complained of should be about to turn the receiver out of possession. The court will not allow the first step to be taken by anyone in an action of ejectment against a receiver, without an application having been first made to the court for permission to take it (e). So, a local authority cannot, without the leave of the court, distrain upon property in the hands of a receiver for money due to it (f); and guardians of the poor may be restrained from levying distress upon property of a lunatic in the hands of a receiver (g).

In *Kewney v. Attrill* (h), after a receiver had been

(c) *Re West Lancashire Railway Co.* (1890), W. N. 165; 63 L. T. 56.

(d) *Britton v. M'Donnel*, 5 Ir. Eq. 275; *Re Stack*, 13 Ir. Ch. 213.

(e) *Hawkins v. Gathercole*, 1 Drew. 18.

(f) See *Pegge v. Neath District Tramways Co.*, [1895] 2 Ch. 508; *Reeve v. Medway Upper Navigation Co.*, 21 T. L. R. 400.

(g) *Winkle v. Bailey*, [1897] 1 Ch. 123.

(h) 34 Ch. D. 345.

Chap. VI. appointed in a Chancery action for dissolution of a partnership, creditors of the firm recovered judgment against it in the Queen's Bench Division for their debt and costs; and, on an application in the Chancery action by the judgment creditors, an order was made giving them a charge for their debt, with interest, and costs, against all moneys of the partnership come or coming to the hands of the receiver, the creditors undertaking to deal with the charge according to the order of the court; the intention of the court being to preserve to the creditors all the rights they would have had if they had issued execution, and the sheriff had seized and sold the assets, on the day on which the application was made. This form of order, however, which is a substitute for leave to issue execution notwithstanding the possession of a receiver (*i*), is frequently made. It does not override the right of the solicitor of the plaintiff in the partnership action to a charge for his costs under section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127) (*k*), but it creates a valid charge against the trustees in bankruptcy of the partners, unless the parties in whose favour it is made had notice of an available act of bankruptcy at the date of the order (*l*).

It has been already pointed out (*m*) that persons with paramount rights, unless actually in possession of them at the appointment, must, after a receiver has been appointed, apply to the court for leave to put them in force unless the order preserves their powers: this applies to cases where a receiver has been appointed over the

(*i*) See e.g., *Brand v. Sand-ground*, 85 L. T. 517.

(*k*) *Ridd v. Thorne*, [1902] 2 Ch. 344, at p. 348.

(*l*) See *Re Gershon and Levy*, [1915] 2 K. B. p. 530.

(*m*) *Ante*, pp. 40, 193.

estate of a tenant in possession. The appointment of a receiver as against the estate of a tenant does not affect the rights of the landlord, but he will not be permitted to exercise those rights without first obtaining the leave of the court. Before distraining he should come to the court and ask for authority to distrain, notwithstanding the appointment of a receiver (n); he acquires no prior claim over other creditors to the proceeds of sale of chattels sold by the receiver after formal notice of his claim to rent (o).

So, again, where, after a mortgagee of leasehold land has obtained the appointment by the court of a receiver, the lessor brings an action against the lessee and obtains judgment for recovery of the land, he (the lessor) cannot proceed to enforce the judgment, as against the receiver, by writ of possession, without first getting the leave of the court to do so (p).

Persons whose rights are interfered with by having a receiver put in their way may, on making a proper application to the court, obtain all that they can justly require (q). The court has the power, and will always take care, to give to a party, who applies in a regular manner for the protection of his rights, the means of obtaining justice, and will even assist him in asserting

(n) *Sutton v. Rees*, 9 Jur. N. S. 456; see, too, *Walsh v. Walsh*, 1 Ir. Eq. 209. Where, however, a receiver is placed over the estate of an inheritor, or superior landlord, and the lands are occupied by under-tenants, the intermediate tenant may distrain upon the occupiers for rent, without any order for the

purpose: *Furlong on Land. and Ten.* 744.

(o) *Sutton v. Rees*, *supra*; see *Re J. W. Abbott & Co.*, [1913] W. N. 284.

(p) *Morris v. Baker*, 73 L. J. Ch. 143.

(q) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117.

Chap. VI. his rights and having the benefit of them (r), though the court does not profess to cure every inconvenience arising from its action in appointing a receiver (s). Where a receiver has been appointed in a partnership action, a creditor who is in a position to levy execution against the assets of the firm may apply to the court for leave to do so, notwithstanding the appointment of a receiver, and thereupon either leave will be given, or an order will be made directing the receiver to pay, so as to avoid a sale by the sheriff (t).

The proper course for a person to adopt who claims a right paramount to that of the receiver, or rather to that of the party who obtained the receiver, and is prejudiced by having the receiver put in his way, is to apply to the court for leave to proceed (u), notwithstanding the possession of the receiver, or to come in and be examined *pro interesse suo* (x). The former course is, as

(r) *Evelyn v. Lewis*, 3 Ha. 475; *Hawkins v. Gathercole*, 1 Drew. 17; *Ex parte Cochrane*, 20 Eq. 282; *Forster v. Manchester and Milford Railway Co.*, 49 L. J. Ch. 454; (1880), W. N. 63; and see *Re Septimus Parsonage Co.*, 17 Times Rep. 420, where possession was given to trustees for debenture holders, though an action was pending by first debenture holders in which the appointment of a receiver was claimed.

(s) *Hand v. Blow*, [1901] 2 Ch. p. 735; see as to rights of lessors, *post*, p. 264.

(t) *Mitchell v. Weise* (1892), W. N. 139.

(u) See also p. 189 as to

incumbrancers.

(x) *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 J. & W. 178; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117; *Ex parte Cochrane*, L. R. 20 Eq. 282. In a case where a receiver had been appointed in a suit instituted by incumbrancers, it was held that a judgment creditor might file a bill against the owner and the receiver to have his debt paid out of the surplus; and that the incumbrancers in the former suit need not be made parties to the latter: *Lewis v. Lord Zouche*, 2 Sim. 388; but now a garnishee order may be obtained: *post*, p. 205.

a rule, preferable. The application may be made by Chap. VI. motion, or on summons (y) with notice (z), and is usually framed in the alternative, that the receiver may pay the amount of the claimant's demand, or that the latter may be allowed to proceed (a). The application must be made in the action in which the receiver was appointed, and not in a fresh action against the person who obtained his appointment (b). In some cases, however, a fresh action may be advisable or even necessary; for instance, where a receiver has been appointed at the instance of incumbrancers, prior equitable incumbrancers, whose security includes other property as well as that mortgaged to the subsequent incumbrancers, if they desire to enforce their security, will find it more convenient to commence a fresh action and serve their notice of motion for a receiver on the parties to the first action. Strictly speaking, a summons should be taken out or notice of motion served in the first action to displace the receiver appointed therein: the same will be the case where an incumbrancer in a partnership business intervenes after a receiver has been appointed in an action between the partners, at all events where he has security in addition to the partnership assets (c).

(y) *Richards v. Richards*, John. 255; comp. *O'Hagan v. North Wingfield Colliery Co.*, 26 Sol. J. 671.

(z) As to form of notice of motion or summons for examination *pro interesse suo*, see Dan. Ch. Forms, 6th ed.

(a) *Brooks v. Greathed*, 1 J. & W. 178; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; *Russell v. East Anglian*

Railway Co., 3 Mac. & G. 125.

(b) *Searle v. Choat*, 25 Ch. D. 723; see, too, *Ames v. Richards*, 40 L. J. Notes of Cases, p. 66, where the application (which failed) was made by motion.

(c) In a suit where a receiver had been appointed at the suit of certain incumbrancers to which the first incumbrancer was not a party, it was held that a bill would lie by him

Chap. VI. It was held in an Irish case that a party who had, without the leave of the court, instituted proceedings at law to recover lands in the possession of a receiver, could not come to the court for leave to continue his proceedings (*d*). If, however, a special case is made out, the court may allow a party to continue an action, notwithstanding that it was commenced after the appointment of a receiver, and that the leave of the court was not in the first instance applied for in reference to the commencement (*e*). In one case, where ejectment was brought against a receiver without the previous leave of the court, the court nevertheless directed an inquiry whether it would be for the benefit of the parties interested, who were adults, that the receiver should defend the ejectment, and charge the expenses in his accounts (*f*).

The court refused to restrain a person from prosecuting an action in a Scottish court, which amounted to interference with a receiver (although it had jurisdiction to do so), where the receiver had been added as a

against the receiver and the several parties to the earlier suit, for the purpose of establishing his priority: *Smith v. Lord Effingham*, 2 Beav. 232. In a later stage of the last-mentioned case (7 Beav. 374), it was said by Lord Langdale, that a receiver was not a necessary party to a bill by a first incumbrancer to establish his right, and that there was reason to doubt whether he was even a proper party. It is irregular to apply for an injunction to restrain a receiver from paying

money to other incumbrancers (2 Beav. 232), or to restrain a person from receiving money from a receiver: *Ib.* 507. The proper relief can almost always be obtained by motion or summons in the original action.

(*d*) *Lees v. Waring*, 1 Hog. 216; comp. *Townsend v. Somerville*, *ib.* 100.

(*e*) *Gowar v. Bennett*, 9 L. T. 310; see, too, *Aston v. Heron*, 2 M. & K. 397.

(*f*) *Anon.*, 6 Ves. 287.

defendant in the Scottish action and his rights and those of the plaintiff could most conveniently be determined in that action (g). Chap. VI.

Where a person has brought an action against a receiver, or has otherwise interfered with his possession, without the leave of the court, the order restraining the irregular act may also give leave, or direct, that the author of it be examined *pro interesse suo* (h).

The inquiry as to interest is conducted in the same manner as that in which it would be conducted if the property were in the possession of sequestrators under a commission of sequestration (i). If the court, on examining the title, is satisfied that the right of the claimant is clear, it will at once decide the matter in his favour, without directing an inquiry, and order the receiver to pay him what he claims (k), or give the claimant leave to enforce his legal remedy, notwithstanding the possession of the receiver (l). Thus, leave was given by the Court of Chancery to a judgment creditor, on his application, to sue out an *elegit* against property in the possession of a receiver (m). So, also, where a person wishes to dis-train on property in the possession of a receiver, the

(g) *Re Derwent Rolling Mills*, 21 T. L. R. 81, 701.

(h) See *Johnes v. Claughton*, Jac. 573.

(i) Dan. Ch. Pr. 1484.

(k) *Dixon v. Smith*, 1 Sw. 457; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 118; *Randfield v. Randfield*, 1 Dr. & Sm. 314, per Kindersley, V.-C.; see, too, *Ex parte Thurgood*, 18 L. T. 18, where damages for injuries sustained by a collision had been

recovered against a railway company over which a receiver had been appointed.

(l) Costs will usually be allowed to a successful applicant: *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14, 488; see *Walsh v. Walsh*, 1 Ir. Eq. 209.

(m) *Gooch v. Haworth*, 3 Beav. 428; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142.

Chap. VI. court, on being satisfied that the legal right of distress is paramount to the title of the party for whose benefit the receiver was appointed, will allow the distress to be made, either for rent (*n*) or for rates or other money due to a local authority (*o*), or for money due to a gas company, for which it has obtained a distress warrant under its statutory power (*p*). Leave will be given to distrain, notwithstanding the possession of a receiver, for a statutory penalty for breach of a condition in the very constitution of a public company, for instance, neglect by a tramway company to keep rails in repair (*q*); but leave was refused to distrain for a penalty under the Highways Acts for failure to pay instalments to a local authority which by agreement had taken over roads which the company was under a statutory liability to repair (*r*). Accordingly, where a company's goods had been mortgaged for more than their value to debenture holders, who brought an action to enforce their rights and obtained the appointment of a receiver, and afterwards the company was ordered to be wound up, leave was given to the landlord of the house in which

(*n*) *Cramer v. Griffith*, 3 Ir. Eq. 232; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 118; *Sutton v. Rees*, 9 Jur. N. S. 456. The right of a landlord to distrain for rent, after the appointment of a receiver in bankruptcy, is limited by the Bankruptcy Act, 1914, s. 35, to six months' rent. See *Ex parte Cochrane*, L. R. 20 Eq. 282.

(*o*) *Pegge v. Neath District Tramways Co.*, [1895] 2 Ch. 508; and see *Winkle v. Bailey*,

[1897] 1 Ch. 123.

(*p*) *Re Adolphe Crosbie, Ltd.*, 74 J. P. 25.

(*q*) *Pegge v. Neath District Tramways Co.*, [1895] 2 Ch. 508; in this case the mortgage did not include the chattels and a receiver ought not to have been appointed over them; see *Reeve v. Medway Upper Navigation Co.*, 21 Times Rep. 400.

(*r*) *Reeve v. Medway Upper Navigation Co.*, *supra*.

the goods were to distrain, notwithstanding the appointment of the receiver, and notwithstanding the winding-up order, on the ground that, for all practical purposes, the goods were not the goods of the company but of the debenture holders, as against whom the landlord was entitled to distrain (s). Again, a judgment creditor may obtain a garnishee order, attaching moneys payable to the judgment debtor which are in the hands of a receiver (t), but only such moneys as are actually in his hands when the order is obtained (u). So, where a rentcharge created by a railway company under the Lands Clauses Consolidation Act, 1845, had been reserved to a landowner, the court gave him liberty to distrain, notwithstanding that a receiver of the tolls of the company had been appointed, in a suit instituted by the owner of a similar rentcharge on behalf of himself and all other owners of similar rentcharges who should come in and contribute to the expenses of the suit (x). So, also, in a case where it was held that a receiver ought not to have been appointed, leave was given to an execution creditor to levy, notwithstanding the appointment (y).

(s) *Ex parte Purssell*, 34 Ch. D. 646, 660, 662. See, too, *Re Harpur's Cycle Fittings Co.*, [1900] 2 Ch. 731, 734, in which case no receiver had been appointed, but Wright, J., considered that that fact made no difference; and distinguish *Re British Fuller's Earth Co.*, 17 Times Rep. 232, where overseers were held to be not entitled to an order directing the receiver appointed in a debenture-holders' action to pay to them the amount of a rate out of moneys in his

hands.

(t) *Re Cowan's Estate*, 14 Ch. D. 638.

(u) See *Webb v. Stenton*, 11 Q. B. D. 518, criticising some of the dicta in *Re Cowan's Estate*, *supra*.

(x) *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14, 488; 16 W. R. 928; *Forster v. Manchester and Milford Railway Co.*, 49 L. J. Ch. 454; (1880), W. N. 63.

(y) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125 see *Fowler v. Haynes*, 2 N. R. 156.

Chap. VI. The procedure in equitable execution being founded on the equitable and not the common law jurisdiction of the court, the practice in the King's Bench Division should follow that in the Chancery Division as nearly as circumstances will admit. Thus, where a prior incumbrancer applied to have an order appointing a receiver discharged, and for consequent relief, numerous affidavits were filed upon the application, and the matter was referred to a Master of the Queen's Bench Division to report. Upon an application to set aside or vary the report, it was held that the court was bound to consider the objections to the report, and to go into the evidence, and to deal with the report as upon a motion to vary the certificate of a chief clerk (z) in the Chancery Division (a).

In cases where the court is not satisfied that a receiver ought to have been appointed, the court may, that the execution creditor may not suffer loss by the possession of the receiver, in case it shall appear in proceedings taken by the creditor that his right ought not to have been interfered with by that possession, order that the receiver keep within the bailiwick for a certain period sufficient property to answer the demand. Or, in such a case, the court may make an order allowing the creditor to levy, unless the amount of his demand be paid into court to the credit of the action within a week from service of the order, the receiver to be at liberty to pay the amount in, and the money to remain in court subject to further order (b).

If incumbrancers come in for examination *pro interesse suo*, and upon inquiry their claim is made out, they are

(z) Now a Master.

(a) *Walmesley v. Mundy*, 13 Q. B. D. 807.

(b) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 151, 153.

entitled to have rents and profits received and to be received by the receiver applied in payment of the costs of the application, and then of their incumbrances (c). Chap. VI.

If there is a doubtful question relating to land, and it is purely a matter of title, the court will give the claimant leave to bring ejectment, taking care, however, to protect the possession by giving proper directions (d). It is not the course of the court, unless it is perfectly clear that there is no foundation for the claim, to refuse leave to try a right which is claimed against its receiver (e).

In an old case, where a prior incumbrancer had delayed over long in pursuing his remedies, the Court of Chancery refused his application, by petition, that a receiver, who had been appointed at the instance of a second incumbrancer, should apply the rents according to their priorities; but leave was given to bring ejectment. The ground of the decision was that the prior incumbrancer had no right to come by petition for relief which he had sought in a suit previously commenced by him, but not proceeded with. No costs were given, however, against the prior incumbrancer (f).

A person who disturbs or interferes with the possession of a receiver is guilty of a contempt of court, and is liable to be committed (g). In extreme or aggravated cases the court will, for the purpose of vindicating its authority, order a committal (h); but it does not ordinarily punish

Committal, &c., for disturbance of receiver.

(c) *Walker v. Bell*, 2 Madd. 21; *Tatham v. Parker*, 1 Sm. & G. 506.

(d) *Empringham v. Short*, 3 Ha. 470.

(e) *Randfield v. Randfield*, 3 D. F. & J. 772; *Lane v. Capsey*, [1891] 3 Ch. 411.

(f) *Brooks v. Greathed*, 1 J. & W. 178.

(g) *Supra*, pp. 193 et seq.

(h) *Helmores v. Smith*, 35 Ch. D. 449; *Broad v. Wickham*, 4 Sim. 511 (application to commit a person for taking forcible possession against a receiver).

Chap. VI. by actual committal. The court is generally satisfied with ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct, and also the costs of the application to commit (*i*). In some cases an injunction restraining the interference may be an appropriate and sufficient remedy (*k*). Thus, where the contempt consists in entering upon land in the possession of a receiver, or in bringing an action against a receiver, or against a person over whose property a receiver has been appointed, the course of the court is to grant an injunction, restraining the party in contempt from trespassing or prosecuting the action, as the case may be, at the same time ordering him to pay the costs of the application to commit (*l*). In such a case, whether the person bringing an action did or did not know that a receiver had been appointed, or however clear his right may be, the court will restrain the prosecution of the action if it was brought without leave (*m*). In *Turner v. Turner* (*n*), the agents of the receiver in the cause, acting upon leave given by the court, having taken forcible possession of a house occupied by a servant of one of

(*i*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 119; *Hawkins v. Gathercole*, 1 Drew. 18; *Fripp v. Bridgwater, &c.*, *Railway Co.*, 3 W. R. 356; *Lane v. Sterne*, 3 Giff. 629; *Ex parte Hayward*, 45 L. T. 326. A partner who had got in debts adversely to the receiver was ordered within a week to make an affidavit of the amount, and to pay that amount to the receiver, and in default to be committed: *Parker v. Pocock*,

30 L. T. 458.

(*k*) *E.g., Dixon v. Dixon*, [1904] 1 Ch. 161.

(*l*) *Johnes v. Claughton*, Jac. 573; *Aston v. Heron*, 2 M. & K. 390; *Tink v. Rundle*, 10 Beav. 318; *Evelyn v. Lewis*, 3 Ha. 473; *Ames v. Birkenhead Docks*, 20 Beav. 354; *Bayly v. Went* (1884), W. N. 197; 51 L. T. 765.

(*m*) *Evelyn v. Lewis*, 3 Ha. 473.

(*n*) 15 Jur. 218.

the defendants, an order was made restraining that defendant from prosecuting an indictment against the agents. An action, however, against a person who professes to have acted under the authority of a receiver, will not be restrained unless it is clear that he has really been acting under that authority (o). Chap. VI.

A motion to commit a person for disturbing the possession of a receiver is improper, if made long after the act complained of, and not for the protection of the receiver's possession, but in order indirectly to compel payment of expenses, after settlement of the question relating to the possession. The proper course is to make directly any application for the payment of expenses or costs which may be warranted by the circumstances (p).

The court will not protect a sheriff who executes process after notice from a receiver that he is in possession (q). Sheriff may not disturb possession of a receiver.

A sheriff who seizes goods in the possession of a receiver is guilty of a contempt of court (r), and may be committed, even though the act is really the act of his under-sheriff, and there is no reason to infer that it is the personal act of the sheriff (s). In a case, however, where an under-sheriff had seized goods in the possession of a receiver, the court, on the submission of the sheriff, abstained from committing him, but ordered him to withdraw from possession, and to pay the costs. It was considered that this order was sufficient, under the

(o) *Birch v. Oldis*, Sau. & Sc. 146. where the sheriff entered under a *fi. fa.* issued out of Chancery.

(p) *Ward v. Swift*, 6 Ha. 312. (r) *Lane v. Sterne*, 3 Giff. 629.

(q) *Try v. Try*, 13 Beav. 422; (s) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 112.

see, too, *Rock v. Cook*, 2 Ph. 691,

K.R.

14

Chap. VI. circumstances of the case, for the maintenance of the jurisdiction (t).

Where a sheriff has taken property, part of which is claimed by a receiver, the latter will be directed to give a list of the property claimed by him to the sheriff, who will be ordered to withdraw from possession of the specified property (u).

A sheriff may also be restrained, if necessary, from compelling a receiver to interplead, and may be ordered to pay the costs of proceedings for that purpose. If the execution creditor is before the court, he will be restrained from proceeding against the sheriff in relation to the property seized by him, or any other property in the possession of the receiver. If the execution creditor is not before the court, this cannot be done, but the sheriff may come to the court for protection, if necessary (x).

The court may empower a claimant, who asserts a right against a receiver, to abate an obstruction. In such a case, the proper form of order is to give the claimant leave, notwithstanding the receiver, to pursue any remedies, or do any acts, that he may lawfully take or do to abate the obstruction (y).

Person
in the
position
of a
receiver
appointed
abroad.

The court will recognise the right of a person, with powers analogous to those of a receiver, appointed by a foreign court of competent jurisdiction over the property of a person resident abroad, to give receipts for dividends on shares in a British company (z): and persons who

(t) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. p. 119.

(u) *Wilmer v. Kidd, Seton*, 7th ed., p. 729.

(x) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 120,

(y) *Lane v. Capsey*, [1891] 3 Ch. 411.

(z) *Lepage v. San Paulo Coffee Estates Co.*, [1916] W. N. 216 (*mandataire séquestre*).

refuse to accept such receipts may be disallowed costs if Chap. VI. an action is brought (a).

The rents and profits of an estate over which a Receiver, &c. receiver has been appointed, including unpaid arrears, are, as far as regards parties to the action, bound from the date of the order for the appointment (b). But the appointment never relates back to the date of the application (c). Still, if a solicitor in the action has received rents without the authority of the court, he must pay them over to the receiver appointed therein, although he may not have been actually clothed with the character of receiver at the time when the rents were received. The solicitor cannot be permitted to set up a lien on them for his costs (d). The right of a prior mortgagee to rents as against a receiver is dealt with on an earlier page (e).

If the tenant for life of a mortgaged estate, with power to lease, exercises the power pending a foreclosure action and after the appointment of a receiver, the lessees are considered, as against prior incumbrancers, as tenants from year to year to the receiver (f).

An order on tenants to pay their rents to a receiver appointed by the court attaches all rents due and unpaid at the time of service of the order. In respect of rents which have accrued and been paid by the tenants prior to such service, they are not answerable (g): and a person

(a) See *Pélegrin v. Coutts & Table Co.*, 101 L. T. 707.
Co., [1915] 1 Ch. 696.

(e) *Ante*, p. 190.

(b) *Lloyd v. Mason*, 2 M. & C. 487; *Codrington v. Johnstone*, 1 Beav. 520.

(f) *Lord Mansfield v. Hamilton*, 2 Sch. & Lef. 28.

(c) *Per Lindley, M.R.*, in *Re Clarke*, [1898] 1 Ch. at p. 339.

(g) *Codrington v. Johnstone*, *supra*; *M'Donnell v. White*, 11 H. L. 570; *Russell v. Russell*, 2 Ir. Ch. 574. See also *Seymour v. Lucas*, 1 Dr. & S. 177; *Ashburton v. Nocton*, *infra*.

(d) *Wickens v. Townsend*, 1 R. & M. 361; see, too, *Re Birt*, 22 Ch. D. 604; *Re British Tea*

Chap. VI. entitled to receive the rents is bound as from the date of the order if he has notice of it (*h*). A prepayment by the tenant to the mortgagor, before the due date, is invalid against a receiver who demands it before that date, whether the mortgage is legal or equitable; the prepayment is only good as to the amount due, not as to the remainder (*i*). But a prepayment or release of the rent before the date of the mortgage or charge is valid against a mortgagee or a receiver (*k*).

Interests
in land.

By virtue of section 2 of the Land Charges Act, 1900, and section 13 of the Judgments Act, 1888, an order appointing a receiver at the instance of a judgment creditor operates to create a charge on interests in land over which the receiver is appointed as soon as it is registered, pursuant to section 5 of the Land Charges Registration and Searches Act, 1888 (*l*); but until so registered no charge is created against a purchaser for value (*m*).

The effect of section 2 of the Land Charges Act, 1888, is that the charge in favour of the creditor is created as soon as a writ or order for the purpose of enforcing it is registered, whether the land can in fact be taken in execution under the writ or order or not: for instance, the registration of an *elegit* creates the charge even on equitable interests (*n*), and it appears to follow that the registra-

(*h*) *Hollier v. Hollier*, 2 Ir. *supra*.
Ch. 376; see *Eastern Trust Co. v. McKenzie, Mann & Co.*, [1915] A. C. 750.

(*i*) *Ashburton v. Nocton*, [1915] 1 Ch. 274, 290; *Cook v. Guerra*, 7 C. P. 132, 136.

(*k*) See *Green v. Rheinberg*, 104 L. T. 149; see *Ashburton v. Nocton*, *supra*.

(*l*) See *Ashburton v. Nocton*,

(*m*) See ss. 4 and 6 of the Land Charges Registration and Searches Act, 1888.

(*n*) *Ashburton v. Nocton*, *supra*. There are expressions to the contrary in *Badger v. Badger*, [1913] 1 Ch. 385, but the statutes were not considered in detail as in *Ashburton v. Nocton*.

tion of an order appointing a receiver creates a charge on Chap. VI.
a reversionary interest or a remainder (o); the charge
created is valid against a trustee in bankruptcy as it
constitutes the creditor a secured creditor (p).

As soon as the order appointing a receiver has been registered, the judgment creditor can apply, by originating summons (q), for a sale of the debtor's interests in the land, so far as they are interests in possession; since the order appointing a receiver amounts to delivery in execution of those interests under section 4 of the Judgments Act, 1864 (r). It was held that no sale could be ordered under that section of a reversionary interest which was incapable of being delivered in execution (s); but even if this is still so, since the repeal of section 1 of the Judgments Act, 1864, it is submitted that a sale might be ordered in an action by the judgment creditor, under the jurisdiction to order sale at the instance of a secured creditor, apart from section 4 (t).

Inasmuch as the effect of an order appointing a receiver is to make the judgment creditor a secured creditor as regards the land, he is entitled to be added as defendant in a foreclosure action. He must, however, take the action as he finds it; a time fixed for foreclosure will not in an ordinary case be extended (u).

An order appointing a receiver at the instance of a judgment creditor does not create a charge on the debtor's personal property, in favour of the creditor at whose

(o) See judgment of the M.R. in case last cited.

(p) See *Ex parte Evans*, 13 Ch. D. 252.

(q) R. S. C. Ord. 55, r. 9B; s. 4, Judgments Act, 1864.

(r) See *Ex parte Evans*, *supra*.

(s) *Re Jones and Judgments Act* (1895), W. N. 123.

(t) *E.g.*, under s. 25, Conveyancing Act, 1881.

(u) *Re Parbola, Ltd.*, [1909] 2 Ch. 437.

Chap. VI. instance the receiver is appointed (*x*). And, that being so, a person who has obtained such an order cannot, merely by giving notice of it, make it a charge (*y*). The court has, therefore, no jurisdiction to make a declaration of charge over personal property over which it is appointing a receiver (*z*).

But although the order does not create a charge, it operates as an injunction to restrain the debtor from himself receiving moneys over which the order extends (*a*), and to restrain him from dealing with the moneys to the prejudice of the judgment creditor (*b*), even though the payment to the judgment debtor is made by a person not bound by the order (*c*).

The judgment creditor, after obtaining a receiver by way of equitable execution, has a right under R. S. C. Ord. 42, r. 32, to examine the debtor as to his means of satisfying judgment, and also under r. 33 as to the debtor's dealings with property, against removal of which an injunction had been granted prior to the appointment (*d*).

If the receivership order does not contain a direction for payment to the judgment creditor, the receiver holds the property, when it reaches his hands, *in medio*, and it remains subject to all claims which are paramount to that

(*x*) *Re Borough of Portsmouth Tramways Co.*, [1892] 2 Ch. 362.

(*y*) *Re Potts*, [1893] 1 Q. B. 648; *Re Beaumont*, [1910] W. N. 181; 79 L. J. Ch. 744; and see p. 215, *post*.

(*z*) See *per* Farwell, J., in *Ridout v. Fowler*, [1904] 1 Ch. 662, 663. This case was affirmed by C. A., [1904] 2 Ch. 94.

(*a*) *Flegg v. Prentis*, [1892] 2 Ch. 428; see *de Peyrecave v.*

Nicholson, 42 W. R. 702; *Westhead v. Riley*, 25 Ch. D. 413.

(*b*) *Per* Lindley, L.J., in *Tyrrel v. Painton*, [1895] 1 Q. B. 206; *per* Farwell, J., in *Ridout v. Fowler*, [1904] 1 Ch. 663, 664.

(*c*) See *Eastern Trust Co. v. McKenzie, Mann & Co.*, [1915] A. C. 750.

(*d*) *Sturges v. Warwick (County of)*, 30 Times Rep. 112.

of the judgment creditor at the date when the order is obtained ; but, subject to these claims, the court will order the receiver to pay the judgment creditor the amount of his debt in priority to the claims of any persons whose interests in the fund are acquired subsequently to the date of the order, except those of persons whose claims may have priority by statute, *e.g.*, a trustee in bankruptcy (*e*). Thus, where a judgment creditor had obtained the appointment of a receiver over certain copper, which was subject to a lien, and the debtors were subsequently adjudicated to be in judicial liquidation in France, it was held that the judgment creditor was entitled to the copper after the lien had been satisfied, in priority to the liquidator, though nothing had been received at the date of the liquidation (*f*).

Further, although a receivership order obtained by a judgment creditor does not create a charge on personal property over which the receiver is appointed, it prevents any subsequent mortgagee or judgment creditor from gaining priority, by means of a stop order or a charging order, over the creditor obtaining the receivership order, if, at the date when the last-mentioned order is obtained,

(*e*) See *per Eady, J.*, in *Re Marquis of Anglesey*, [1903], 2 Ch. pp. 731, 732 ; *per Kekewich, J.*, in *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 170 ; *Ex parte Peak Hill Goldfield, Ltd.*, [1909] 1 K. B. p. 437.

(*f*) *Levasseur v. Mason and Barry*, [1891] 2 Q. B. 73. The English Bankruptcy Acts had no application in this case (see *Re Pearce*, [1919] 1 K. B. p. 364). The case of *Ridout v. Fowler*, [1904] 2 Ch. 93, cited *supra* (claim

by judgment creditor of purchaser in respect of forfeited deposit), was decided against the creditor on the ground that the forfeiture of the deposit by the vendor was under the contract by virtue of the purchaser's default, which was prior in date to the receivership order ; and that certain money paid by the vendor, was to secure possession of the land, not in part repayment of the deposit.

Chap. VI. the property of the judgment debtor cannot be taken in execution or made available by any other legal process (g); the mere omission to obtain a stop order does not postpone a judgment creditor who has obtained a receivership order to a person who subsequently obtains a stop order (h). But an assignee for value of a debt has priority over a judgment creditor who obtains a receivership order, although the order is made before notice of the assignment has been given (i).

Inasmuch as a receivership order operates to prevent the judgment debtor from dealing with the property comprised in it, he cannot utilise such property for purposes of a cross-claim or by way of set-off against a third person. Thus, where the property consists of debentures of a company which have become due, the judgment debtor cannot set them up to defeat a bankruptcy petition by the company, founded on a debt less in amount than the sum secured by the debentures (k).

A receiver appointed at the instance of a creditor holds the goods of the debtor as agent for the court, not for the creditor. He holds them for the court, in order that it may decide the right to them. Moreover, an order

(g) See *per* Swinfen Eady, J., in *Re Marquis of Anglesey*, [1903] 2 Ch. 727, at p. 731. In that case the receivership order was obtained over a judgment debtor's interest in residuary personal estate, partly in court and partly in the hands of an executor to whom notice of the order was at once given; at the date of the order, the residue was unascertained, and the fund in court was insufficient for

the payment of the testator's creditors, and therefore the judgment creditor obtaining the order did not obtain either a charging order or a stop order.

(h) See *Re Galland* (1886), W. N. 96; *Fahey v. Tobin*, [1901] 1 Ir. R. p. 516.

(i) *Re Bristow*, [1906] 2 Ir. R. 215.

(k) *Re a Debtor, Ex parte Peak Hill Goldfield, Ltd.*, [1909] 1 K. B. 430, 437.

appointing a receiver of the goods of a debtor does not Chap. VI.
 make a judgment creditor who has obtained such an order a secured creditor within the meaning of ss. 7 and 167 of the Bankruptcy Act, 1914 (*l*). It can only do so if it charges the person in whose hands the money is, not to deal with it except by paying it to, or holding it for, the execution creditor (*m*): therefore orders directing the receiver after making such payments as might be ordered, to accumulate the balance to form a fund for payment of the judgment debt, did not create a valid charge against the trustee (*n*); but an order directing payment of certain costs out of money in the hands of a receiver does amount to such a charge, unless the debtors had notice of an act of bankruptcy at the date of the order, followed by adjudication (*o*). Nor does the order create any charge, so as to give the creditor priority over other creditors, where the judgment debtor is a company in liquidation (*p*). It is not execution, so as to entitle the executors of a deceased judgment creditor to apply for it under R. S. C. Ord. 42, r. 23, in order to enforce a judgment obtained by their testator (*q*). Nor does it amount to a stay of execution within section 1, 1 (*g*) of the Bankruptcy Act, 1914, so as to disentitle the judgment creditor obtaining the order to issue a bankruptcy notice in respect of the same debt (*r*).

(*l*) *Re Dickinson, Ex parte Charrington*, 22 Q. B. D. 187; *Re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648; *Re O'Neill*, 21 L. R. Ir. 211.

(*m*) *Per Eady, M.R., Re Pearce*, *infra*.

(*n*) *Re Pearce*, [1919] 1 K. B. 354.

(*o*) *Re Gershon and Levy*, [1915] 2 K. B. 527, 532; as to effect of

a Scottish bankruptcy, see B.A. (Scotland), 1913, and *Singer v. Fry*, 113 L. T. 552.

(*p*) *Croshaw v. Lyndhurst Ship Co.*, [1897] 2 Ch. 154; *Re Lough Neagh Ship Co.*, [1896] 1 Ir. R. 29.

(*q*) *Norburn v. Norburn*, [1894] 1 Q. B. 448; see p. 58, *ante*.

(*r*) *Re Bond, Ex parte Capital and Counties Bank*, [1911] 2

Chap. VI. The title of the trustee in bankruptcy prevails over that of a receiver appointed by way of equitable execution in respect of after-acquired property of the bankrupt, since section 47 of the Bankruptcy Act only protects purchasers for value (s).

Where, in an action to enforce an agreement by the defendant to give a bill of sale of sundry chattels, an interim receiver of the chattels was appointed and took possession, and very soon afterwards the defendant became bankrupt, it was held that the possession of the receiver had taken the chattels out of the order and disposition of the bankrupt at the time of his bankruptcy (t). But the appointment of a receiver of the book debts of a trader who is afterwards adjudicated bankrupt does not take them out of the order and disposition of the bankrupt, unless the appointment is followed by notice to the debtors before the bankruptcy (u).

In this connection it is to be observed that by section 43 of the Bankruptcy Act, 1914, an assignment, or charge by a trader or person engaged in business on present or future book debts, except debts due from specified debtors, or growing due under specified contracts, or

K. B. 988; nothing had in fact come into the hands of the receiver; the court in bankruptcy may inquire whether the receivership order prevented payment of the debt (ib.).

(s) *Hosack v. Robins* (No. 2), [1918] 2 Ch. 339, a case of a charging order.

(t) *Taylor v. Eckersley*, 5 Ch. D. 741.

(u) *Rutter v. Everett*, [1895] 2 Ch. 872. In *Re Neal*, [1914] 2 Ch.

910, Horridge, J., expressed disagreement with the dictum of Stirling, J., in *Rutter v. Everett*, *supra*, to the effect that if bankruptcy supervened before notice could reasonably be given, the debts would not be in the order and disposition of the bankrupt, the former judge considering that the assignee of the debt might well have given the notice before the application for a receiver.

debts included in a *bond fide* transfer of a business for value, or on an assignment of assets for the benefit of creditors, is void against the trustee in bankruptcy unless registered as a bill of sale. Chap. VI.

Since the receiver is not an agent of any party but an officer of the court, a receiver appointed in a partnership action is not a person having "the control or management of the partnership business," upon whom a bankruptcy notice can be served by a creditor of the firm (*x*).

An ordinary hire-purchase agreement in respect of machinery affixed to the land confers an equitable interest in the land on the hirers-out in priority to the interests of subsequent equitable incumbrancers, such as debenture holders, and entitles them to enter and remove the thing hired after the appointment of a receiver, on leave being obtained (*y*). Hire-purchase agreement.

When money comes into the hands of a receiver appointed in a foreclosure action, and no particular direction has been given for its application, it belongs *primâ facie* to the plaintiff, and he, accordingly, has a *primâ facie* right to receive it, in the event of and upon the dismissal of the action (*z*). An order for payment of money out of court may be made after the dismissal of an action (*a*). To whom money in the hands of a receiver appointed in a foreclosure action belongs on dismissal of action.

A receiver appointed by the court cannot, on the ground that his appointment has been improper, be compelled to interplead; but he may, if summoned,

(*x*) *Re Flowers & Co.*, [1897] 1 Q. B. 14; and see *Boehm v. Goodall*, [1911] 1 Ch. 155, *ante*, p. 186. *Whiteley, Ltd. v. Hill*, [1918] 2 Ch. 808.

(*z*) *Paynter v. Carew*, 18 Jur. 417.

(*y*) *Re Morrison, Jones and Taylor, Ltd.*, [1914] 1 Ch. 50; as to property in chattels, see (*a*) *Wright v. Mitchell*, 18 Ves. 292.

Chap. VI. appear for the purpose of asserting his right, and denying the right of any court other than that which appointed him to interfere with his possession (b).

If a receiver improperly pays money in his hands contrary to the order of the court which appointed him, the person to whom it has been paid will be ordered to repay it, and the receiver may be liable to pay the costs of the motion for that purpose. The court never allows any person to interfere without its leave with money or property in the hands of its receiver, whether it is done by the consent or submission of the receiver, or by compulsory process against him. All moneys which come to the hands of a receiver by virtue of an order of the court enabling him to receive, and entitling him to give a good discharge to the persons paying them, are moneys belonging in a sense to the court, and the receiver can discharge himself only by paying them in obedience to the direction and order of the court. A judgment creditor cannot, without leave, attach under a garnishee order moneys in the hands of a receiver which have been directed to be paid by him to the judgment debtor (c). It is not necessary to wait for the passing of a receiver's accounts before applying to the court to prevent him from misapplying moneys in his hands (d).

Charging
order.

The appointment of a receiver and manager does not necessarily amount to such a preservation of property as to entitle the solicitor to a charging order for his costs; for instance, where the attack, from which the property was preserved, was that of the party whose solicitor

(b) See *Russell v. East Anglian &c., of Brecon*, 28 Beav. 200, *Railway Co.*, 3 Mac. & G. 115, 203; and *ante*, p. 205.

(d) *De Winton v. Mayor, &c., of Brecon*, 28 Beav. 200, 203.

(c) See *De Winton v. Mayor, of Brecon*, 28 Beav. 200, 203.

asks for the charging order (e). The solicitor for plaintiff Chap. VI. in a partnership action is, *prima facie*, entitled to a charging order (f). In an Irish case the solicitor for a judgment creditor, who had been appointed receiver by way of equitable execution, over so much of a sum due to the defendant as would satisfy the debt and costs, was held entitled to a charge for costs over the amount payable to the judgment creditor (g).

An action cannot be brought against a receiver by a person at whose instance he has been appointed (h). A ^{Action against receiver.} person who is prejudiced by the conduct of a receiver appointed in an action ought not, without the leave of the court, to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority. His proper course, in such a case, is to make an application for such relief as he is entitled to in the action in which the receiver was appointed (i). Where a receiver has been appointed by a court having jurisdiction in bankruptcy, the person at whose instance he was appointed must make any complaint which he may have against him to the court which made the appointment, and not otherwise (k). In a case in which, at the time when a receiver was appointed, by way of equitable execution, by a judge of the High Court on the application of a judgment creditor, the debtor's property

(e) *Wingfield v. Wingfield*, [1919] 1 Ch. 462; *secus*, where there is collusion, *ib.* p. 472.

(f) *Ante*, p. 198.

(g) *Duff v. Tuile*, [1914] 2 Ir. R. 31.

(h) *Ex parte Day*, 48 L. T. 912; (1883), W. N. 118.

(i) *Searle v. Choat*, 25 Ch. D. 723; and *ante*, p. 199.

(k) See *Ex parte Cochrane*, L. R. 20 Eq. 282; *Ex parte Day*, 48 L. T. 912; (1883), W. N. 118. See as to jurisdiction of High Court and County Courts, Bankruptcy Act, 1914, ss. 98, 99.

Chap. VI. was legally, though not actually, in the possession of a receiver appointed by a County Court having jurisdiction in bankruptcy, the equitable execution obtained by the judgment creditor was held to be ineffectual (*l*).

A person who is not party should apply by summons in the action for payment out of a fund in court or by the receiver personally of a debt due to him, where the receiver is personally liable for the debt and though it may be ultimately payable by subrogation out of the fund (*m*).

The appointment of a receiver in an action will not prevent the operation of the Statute of Limitations against a rightful owner who is out of possession and is not a party to the action (*n*) ; nor will it interrupt the possession of a stranger, so as to prevent the Statute of Limitations from conferring a title on him (*o*). Nor is a right to damages which has already accrued taken away by the appointment, by consent, of a receiver (*p*).

Receiver
not
acting.

Where a receiver had been appointed at the instance of an incumbrancer of a company, and no security was given and the receiver never acted, the action was stayed on the application of the official solicitor under Ord. 30, r. 9, on production of the company's consent (*q*).

When sequestrators are in possession of lands or

(*l*) *Salt v. Cooper*, 16 Ch. D. 544.

(*m*) *Re Ernest Hawkins & Co.*, 31 Times Rep. 237 : the application was premature as the receiver's account had not been taken. See also *Brocklebank v. E. London Ry.*, 12 Ch. D. 839.

(*n*) *Harrison v. Duigman*, 2 Dr. & War. 295. Comp. *Wrixon v. Vize*, 3 Dr. & War. 123.

(*o*) *Groom v. Blake*, 6 Ir. C. L.

401 ; 8 Ir. C. L. 432. As to payment by a receiver taking the demand out of the Statute of Limitations, see *infra*, Chap. VII., p. 258.

(*p*) *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66 ; [1892] A. C. 166.

(*q*) *Re Cornish Tin Sands, Ltd.*, [1918] W. N. 377 : costs ordered to be paid by plaintiff.

tenements in question in an action, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration (r). Similarly, the appointment of a receiver in an action has been held to put an end to the power of a trustee appointed for the benefit of creditors to collect the rents (s).

In a case in which the testator, after devising lands to his son for life, had declared that, in case the property so devised should "be taken in execution by any process of law for the benefit of any creditor," the devise should immediately become void, and a judgment creditor of the son (who was in possession) obtained an order appointing a receiver of the rents, it was held that the appointment was a taking in execution, and operated to determine the son's life estate (t); but the mere appointment of a receiver over a life interest in residuary estate, where nothing has been done under the order, was held not to cause the life interest to belong to or become vested in any other person so as to cause a forfeiture (u). But where a testator's son-in-law was entitled to a share of the income of the residuary estate during his life or until he should charge the share or any part of it, and, a receiver having been appointed in an action for the administration of the estate, the son-in-law, in November, 1902, wrote to the receiver, telling him that he owed a sum of £5 payable in the following January, and asking him to "deduct this sum from any moneys that may be found due to me on the passing of your

(r) *Shaw v. Wright*, 3 Ves. 22, 3 Ch. 209.

24; *Reeves v. Cox*, 13 Ir. Eq. 247.

(s) *M'Donnell v. White*, 11 H. L. C. 570.

(t) *Blackman v. Fysh*, [1892]

(u) *Re Beaumont*, 79 L. J. Ch.

744; [1910] W. N. 181; and see *Re Laye*, [1913] 1 Ch. 298.

Chap. VI. accounts by the Court of Chancery on that date," and to pay it to the creditor, it was held by the Court of Appeal that, inasmuch as at the date of the letter the receiver had in his hands on account of income a sum of more than £5 to which the son-in-law was entitled, the latter had not incurred a forfeiture. The letter might reasonably be construed as referring to the money actually in the hands of the receiver; and the receivership order did not make that a forfeiture which would not have been a forfeiture if the order had not been made (x). If the forfeiture is expressed to operate only on an assignment, or "attempt" to assign or to cause the property to vest in another person, it appears that the appointment of a receiver would cause no forfeiture (y).

Receiver
considered
as agent
of party
entitled.

When the party entitled to an estate over which a receiver has been appointed has been ascertained, the receiver will in some cases be considered as his receiver (z). Accordingly, where a receiver was appointed in a suit for specific performance at the instance of a vendor, and the purchaser was compelled to accept the title, it was held that the receiver must be considered as his receiver (a). In a case, however, where a receiver had been appointed in consequence of the inability of the vendor of an estate, sold under a decree, to make out his title, the court was of opinion that the expenses of a receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of a fund in court, together with the costs to the application (b).

(x) *Durran v. Durran*, [1904] W. N. 184; 91 L. T. 187. *Rigge v. Bowater*, 3 Bro. C. C. 365.

(y) See *Re Evans*, [1920] 2 Ch. 304, a case of bankruptcy. (a) *Boehm v. Wood*, T. & R. 345; see, too, *Re Butler*, 13 Ir. Ch. 456.

(z) *Boehm v. Wood*, T. & R. 345; *Re Butler*, 13 Ir. Ch. 456; (b) *M'Cleod v. Phelps*, 2 Jur. 962.

Inasmuch as a receiver appointed by the court is appointed on behalf and for the benefit of all persons interested, being parties to the action (c), if a loss arises from the default of a receiver so appointed, the estate must bear it as between the parties to the action (d). A plaintiff cannot claim damages for the detention of any goods whilst they are in the hands of a receiver so appointed. Any damage which the plaintiff may suffer thereby is due to the law's delay, and not to any wrongful act of the defendant (e).

Chap. VI.
Loss arising from default of receiver must be borne by the estate.

The appointment of a receiver removes the parties to the action from the right to receive the rents and profits and as against them gives the receiver the right to take possession of chattels, and recover choses in action, which are the subject of his appointment. The receiver does not receive the rents by virtue of an estate or title vested in him: he is merely an officer of the court appointed to collect the rents upon the title of certain persons who are parties to the action (f). The appointment of a party to the action removes the parties as such from the right to the rents or tolls: thus the appointment of the chairman of trustees of a dock company removed the trustees from possession and receipt of the tolls (g). So also the personal liability of executors for rent of leasehold property

Possession of receiver.

(c) *Davis v. Duke of Marlborough*, 2 Sw. 118; *Bertrand v. Davies*, 31 Beav. 436; *Frazer v. Burgess*, 13 Moo. P. C. 314; *Defries v. Creed*, 34 L. J. Ch. 607.

(d) *Hutchinson v. Massareene*, 2 Ba. & Be. 55; and see *Re London United Breweries*, [1907] 2 Ch. 511, and p. 300, *post*.

(e) *Peruvian Guano Co. v.*

K.R.

Dreyfus Brothers, [1892] A. C. 166. As to liability in trespass of a receiver appointed by debenture holders out of court, see *Re Goldburg*, [1912] 1 K. B. 606, and p. 380, *post*.

(f) *Vine v. Raleigh*, 24 Ch. D. 243.

(g) *Ames v. Birkenhead Docks*, 20 Beav. 350.

Chap. VI. of the testator on which they had entered was held to be suspended during the term of the receivership (*h*).

A receiver of lands does not take actual possession unless the order specifically directs him to do so (*i*): if one of the parties is in possession, he may either be ordered to attorn tenant or deliver up possession to the receiver (*k*). If the order does not specifically direct possession to be given up to the receiver, his entry does not effect any change in the occupation within section 16 of the Poor Rate Assessment and Collection Act, 1869, or similar statutes, so as to exempt them from arrears of rates owing by a company, whose incumbancers procured the appointment (*l*): nor is he a different person from a mortgagor under section 16 of the Gas Works Clauses Act, 1847, to enable him to claim to be supplied with gas without payment of arrears (*m*): for the relation of the receiver to the party going out of possession is rather that of caretaker and owner than that of incoming and outgoing tenant. So a receiver is not an "owner" within section 4 of the Public Health Act, 1875 (*n*). In connec-

(*h*) *Minford v. Carse*, [1912] 2 Ir. R. 245.

(*i*) *Ex parte Evans*, 13 Ch. D. 255; see *Re Marriage, Neave & Co.*, [1896] 2 Ch. 663.

(*k*) See *Charrington v. Camp*, [1902] 1 Ch. 386.

(*l*) *Re Marriage, Neave & Co.*, *supra*; *National Prov. Bank of England v. United Electric Theatres, Ltd.*, [1916] 1 Ch. 132. It is not clear that this would not be so in case of a company, even if delivery of possession so far as necessary for purposes of the receivership were ordered: see

per Vaughan Williams, L.J., in *Husey v. London Electric Corp.*,

[1902] 1 Ch. 411; *Parsons v. Sovereign Bank of Canada*, [1913]

A. C. 160. Where the appointment is made out of court, a change of occupation may be effected according to the terms of the power: *Richards v. Kidderminster Overseers*, [1896] 2 Ch. 212.

(*m*) *Paterson v. Gas Light and Coke Co.*, [1896] 2 Ch. 476.

(*n*) *Corporation of Bacup v. Smith*, 44 Ch. D. 495. As to liability as "owner" for water rate, see p. 287.

tion with these cases it must be remembered that under Chap. VI. section 209 of the Companies (Consolidation) Act, 1908, arrears of rates now have priority where the appointment is made on behalf of persons with a floating security (o).

In a case where a receiver, appointed in a debenture-holders' action, had, under an order for delivery of possession "as far as necessary for the purposes of the receivership," entered into possession of a hotel, it was held that the receiver was not entitled to an injunction to restrain an electric lighting company from cutting off the electric current on the ground that the receiver had not entered into a new contract for the supply of electricity under the Electric Lighting Act, 1882: the court did not decide whether such a contract was necessary on the ground that the receiver's possession amounted to a fresh occupation, because, if it did not, the electric lighting company could properly have cut off the supply until arrears due by the hotel company were paid (p). It does not appear that the Electric Lighting Act, 1909, has made any alteration in the law in such a case (q).

The power of the court to direct a sale in actions by Sale. incumbrancers to enforce their securities is elsewhere mentioned (r); in the case, however, of statutory corporations formed to work a public undertaking, a sale of the undertaking cannot be ordered (s) except where the

(o) See p. 272, *post*.

(p) *Husey v. London Electric Supply Corp.*, [1902] 1 Ch. 411.

(q) See s. 18, which authorises the company to cut off the supply to any person whose arrears are unpaid: unless there is a change in the "person" requiring the supply, it could be cut off hereunder (see *Paterson v. Gas*

Light and Coke Co., *supra*); if there is a change the provisions as to a contract being entered into still apply: see also s. 15.

(r) See p. 228; as to sale of fixtures, see p. 269.

(s) *Re Woking U.D.C. Act*, 1911, [1914] 1 Ch. 300; *Gardner v. L.C.D. Ry.*, 2 Ch. 201.

Chap. VI. statute under which the incorporation takes effect authorises a sale (*t*).

It is provided by Ord. 51, r. 1 (*b*), that in debenture-holders' actions, where the debenture holders have a charge and the plaintiff is suing on behalf of himself and other debenture holders, a sale may be ordered before as well as after judgment before all persons interested are ascertained, where the judge is of opinion that there must eventually be a sale (*u*). The sale may be directed out of court if all parties are before the court or bound by the order. The sale is frequently ordered to be made by the receiver, and if not directed to be made out of court a conditional contract by him is approved by the judge (*x*). The order contains directions as to disposal of the purchase-money.

If the sale is made by the receiver, the actual assurance must be made by the parties in whom the property is vested (*y*). If the company is being wound up, the liquidator must concur and also, if the legal interest is in the company, affix the seal of the latter to pass any interest of the company. If the company has been dissolved before a contract for sale has been completed,

(*t*) See *Crystal Palace Co.*, 104 L. T. 251, 898; *sub nom. Saunders v. Bevan*, 107 L. T. 70.

(*u*) See nn. to that order in Annual Practice, and generally as to sales in debenture-holders' actions, Palmer, Vol. III., Chap. 70.

(*x*) Forms of Order, Palmer, Vol. III., pp. 724 *et seq.* Unless all debenture holders subsequent to the plaintiff are parties, it is usual to direct a sale with the approbation of the judge that

absent debenture holders may be brought in on the application to approve the conditional contract: *Re Crigglestone Coal Co.*, [1906] 1 Ch. 523.

(*y*) *E.g.*, trustees of a debenture trust deed. The action does not destroy trustees' power of sale, but they must obtain leave of the court (Seton, 1186); the trustees are usually given conduct of the sale (Ord. 50, r. 10; see *Re Love*, 29 Ch. D. 349).

an order must be obtained, vesting in the purchaser any legal interest in land which was in the company (z). Where a lease was vested in the company, the petition for a vesting order was ordered to be served on the lessor, since the dissolution of the company accelerates the reversion, subject to the assignees' rights (a). In the case of a patent, a vesting order was refused, apparently because the patent would have been destroyed by vesting as *bona vacantia* in the Crown, but an order by the Board of Trade directing the controller to register the assignee was subsequently made (b). It appears uncertain whether a debt due to a corporation is discharged by its dissolution, or vests in the Crown as *bona vacantia* (c).

If no winding-up is in progress the seal of the company must be affixed by the receiver or some other person authorised by the court, to pass the company's interest.

The receiver cannot himself purchase directly or indirectly (d).

COMPANIES.

The general principles stated in the earlier part of this chapter relative to the possession of a receiver and the

(z) *Re R. Mills & Co.*, [1905] W. N. 36; *Re General Accident Assurance Co.*, [1904] 1 Ch. 147; *Re 9, Bomore Road*, [1906] 1 Ch. 359; *Re Ruddington Land*, [1909] 1 Ch. 701 (Industrial and Provident Society; see Industrial and Provident Soc. Am. Act, 1913, s. 8).

(a) *Re Albert Road, Norwood*, [1916] 1 Ch. 289; see *Hastings Corporation v. Letton*, [1908] 1 K. B. 378, approved in *Re Woking U.D.C. 1911 Act*, [1914] 1 Ch.

300. It appears that in the case of freeholds the petition should, strictly, be served on the original grantor: see comments on *Hastings Corp. v. Letton*, *supra*; in *Re Woking U.D.C.*, *supra*; and Blackstone Com. I. 284.

(b) *Re Taylor's Agreement Trusts*, [1904] 2 Ch. 737.

(c) See *Higginson v. Dean*, [1899] 1 Q. B. 325; and see *Hastings Corp. v. Letton*, *supra*, at p. 385 of report.

(d) See pp. 271, 285.

Chap. VI. effect of the appointment are equally applicable to receivers of the undertaking and property of a company. This section deals only with principles and decisions peculiarly applicable to such last-mentioned receivers: the early part of the chapter should therefore be consulted on any points not mentioned in this section.

Nature of floating charge.

The appointment of a receiver with or without powers of management of the undertaking and property of a company is usually made at the instance of debenture holders or other persons having a floating security, or more rarely at the instance of a specific mortgagee. The nature and effect of a floating security has been discussed at length in many cases (e): it may be shortly described as an equitable charge on the assets for the time being of a going concern according to their varying condition, which remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge exists intervenes, a right which in default of agreement he may exercise as soon as he pleases after default. As distinct from a specific charge which fastens on definite or ascertained property, or property capable of being defined or ascertained, a floating charge is ambulatory and hovers over the property until some event occurs which causes it to settle, and crystallise into a specific charge (f).

A floating charge need not include all the assets (g);

(e) See the cases collected in *Palmer's Company Prec.*, Vol. II., Chap. XI.

(f) See *per* Lord Macnaghten in *Gov. Stock Co. v. Manila Ry. Co.*, [1897] A. C. p. 86; *Illingworth v. Holdsworth*, [1904] A. C. 355; *De Beers Cons. Mines*,

Ltd. v. British S. Africa Co., [1912] A. C. 52; *Re Standard Rotary Machine Co.*, 95 L. T. 829.

(g) *Yorkshire Woolcombers' Assoc.*, [1903] 2 Ch. 284; *affd. sub nom. Illingworth v. Houldsworth*, [1904] A. C. 355.

but it must embrace both present and future property Chap. VI. and all property of a particular class (*h*), which would in the carrying on of the company's business change from time to time (*i*). So long as the charge remains floating, the company can deal with its business in the ordinary course, and, unless otherwise agreed by the terms of the charge, create specific mortgages in priority to it (*k*); and even if the creation of specific mortgages is forbidden, the specific mortgagee may have priority if he takes without notice of the prohibition (*l*). A registered mortgage, even with notice of an unregistered charge, has priority to the latter (*m*).

The appointment of a receiver is one of the events which causes the floating charge to crystallise (*n*). The order operates from the date when the appointment becomes effective (*o*). The receiver becomes entitled to possession of the company's assets, and any interference with his possession is a contempt of court (*p*). He takes subject to all specific charges which have been validly created by the company in priority to the floating charge (*q*), and to all rights of set-off acquired by debtors

Crystallisation of floating charge and effect thereof.

(*h*) *Ib.*, [1903] 2 Ch. 284, *per* [1915] 1 Ch. 647.
Cozens-Hardy, L.J.

(*i*) *Ib.*, p. 295, *per* Romer, L.J.; see *Nat. Prov. Bank of England v. United Electric Theatres, Ltd.*, [1916] 1 Ch. 132.

(*k*) *Colonial Trusts Corp.*, 15 Ch. D. 465; see *Hamer v. London City and Midland Bank*, 118 L. T. 571.

(*l*) *Castell and Brown, Ltd.*, [1898] 1 Ch. 315; see *Cox v. Dublin Distillery*, [1906] 1 Ir. R. 446.

(*m*) *Re Monolithic Building Co.*,

(*n*) See *Robson v. Smith*, [1895] 2 Ch. 118; *Re Crompton & Co., Ltd.*, [1914] 1 Ch. 954. As to when appointment is made, *ante*, Chap. II., ss. 6 and 7.

(*o*) *Ante*, pp. 178, 186.

(*p*) See the earlier part of the chapter for these topics treated at length.

(*q*) As to what specific charges have priority, see *ante*, p. 78: debentures or charges issued before the appointment may be valid, even if issued after action

Chap. VI. to the company in respect of dealings with it (r). But the title of the receiver prevails over that of execution creditors who have not completed their execution (s); even though the debentures were not issued at the date of the execution if there was a valid contract for their issue (t); and therefore is good against a person who has obtained a garnishee order *nisi* (u), or even absolute, if the charge crystallises before actual payment (x). It was held in one case (y) that the title of the receiver prevailed even over that of a creditor who had obtained a garnishee order absolute, before the debentures were issued to a person with notice of the order, but it is submitted that this case would not be followed (z). Though the title of the receiver is good against the sheriff, where the execution has not been completed, the receiver cannot claim money in the hands of the sheriff paid by the company on account of the judgment creditor's debt, since the receiver has no title to money paid on account

brought, subject to the provisions of s. 212, Companies (Consolidation) Act, 1908.

(r) *E. Nelson & Co. v. Faber*, [1903] 2 K. B. 367; see *Ex parte Peak Hill Goldfield, Ltd.*, [1909] 1 K. B. 430.

(s) *Re Opera, Ltd.*, [1891] 3 Ch. 360; *Davey & Co. v. Williamson & Sons*, [1898] 2 Q. B. 194; *Evans v. Rival Granite Quarries*, [1910] 2 K. B. 979.

(t) See *Simultaneous Colour Printing Syn. v. Foweraker*, [1901] 1 K. B. 771.

(u) *Norton v. Yates*, [1906] 1 K. B. 112.

(x) *Cairney v. Back*, [1906] 2 K. B. 746; see *Sinnott v. Bowden*, [1912] 2 Ch. 414.

(y) *Geisse v. Taylor*, [1905] 2 K. B. 658.

(z) For though a garnishee order creates no charge, it earmarks a debt to answer a particular claim and prevents the creditor from assigning it, except subject to the garnishee order: *Galbraith v. Grimshaw*, [1910] A. C. 511; see also *S.C.*, [1910] 1 K. B. 339, *per Kennedy and Farwell*, L.J.J.; *Goetz v. Adams* (1874), R. 150.

of a debt even under pressure (a) ; nor to money paid to the garnishor before crystallisation (b). Chap. VI.

The holder of a floating charge might assert his claim to the property which the company has disposed of by a fraudulent transaction if the assignee was a party to the fraud, since that would not be a dealing in the ordinary course of business (c) ; but he cannot assert his claim to part only of the property comprised in his charge, before the whole security crystallises : he cannot therefore acquire priority by giving notice to a debtor not to pay his debt to a garnishor (d), nor by giving notice to trustees of a fund not to deal with it (e) ; though the appointment of a receiver would have given priority in both these cases by causing the charge to crystallise.

The effect of the appointment of a receiver is to paralyse the powers of the company (f). The legal *persona* of the company however still subsists, and its powers are delegated to the receiver by his appointment as manager with whatever limitations may be imposed by the order (g) : the powers of the receiver in that event are discussed in Chapter XIII. The receiver is not, *primâ facie*, an agent of either the company or the incumbrancers, but an officer of the court exercising the company's powers as such, and as a principal (h). Nature of possession of a receiver and effect on contracts.

If the receiver is not also appointed manager the contracts of the company involving work to be done or Contracts of service.

(a) *Robinson v. Burnell's Quarries, supra.*

Vienna Bakery Co., [1904] 2 K. B. 624. (e) *Re Ind, Coope & Co.*, [1911] 2 Ch. 223.

(b) *Robson v. Smith*, [1895] 2 Ch. 118. (f) *Moss S.S. Co. v. Whinney*, [1912] A. C. 263.

(c) See *Williams v. Quebrada Copper Co.*, [1895] 2 Ch. 751. (g) *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160.

(d) *Evans v. Rival Granite* (h) *Infra*, p. 295.

Chap. VI. goods to be supplied by the company are determined, since there is no longer any person in existence with power to carry those contracts into effect (i) : the other parties to such contracts may therefore claim damages for breach (k). There are certain contracts where the relationship is of a personal nature, such as contracts of service, which are *primâ facie* determined by the appointment of a receiver even though he is also appointed manager (l) : there may however, it seems, be contracts of service, which the change effected by the receiver's appointment may be insufficient to determine, as, for instance, in the case of labourers employed on an agricultural estate (m).

The servant whose contract has been determined by the appointment can claim damages for wrongful dismissal (n). But if the receiver has continued to employ him at the same or increased wages for the residue of his term, the continuance in employment would possibly amount to a waiver of the breach by the servant. A covenant restricting the servant's employment after the termination of his service cannot be enforced when the appointment of a receiver has operated as a dismissal (o).

(i) *Re Newdigate Colliery Co., Ltd.*, [1912] 1 Ch. 468.

(k) See *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160; as to damages, see *Re Vic. Mill, Ltd.*, [1913] 1 Ch. 465.

(l) *Reid v. Explosives Co., Ltd.*, 19 Q. B. D. 264; *Parsons v. Sovereign Bank of Canada*, *supra*.

(m) *Parsons v. Sovereign Bank of Canada*, [1913] A. C. p. 171; see also judgment of Moulton, L.J., in *Whinney v. Moss S.S. Co.*, [1910] 2 K. B. 813: as to position of directors, see *Welstead*

v. Hadley, 21 Times Rep. 165; *Measures Bros. v. Measures, Ltd.*, [1911] 2 Ch. 248.

(n) *Measures Bros., Ltd. v. Measures*, [1910] 1 Ch. 344; or if a new contract with the receiver is implied, only nominal damages could be recovered: see *Brace v. Calder*, [1895] 2 Q. B. 261; see *Re English Joint Stock Bank*, 3 Eq. 341; *Re Forster*, 19 L. R. Ir. 240.

(o) *Measures Bros., Ltd. v. Measures*, [1910] 2 Ch. 248; see *General Bill Posting Co. v. Atkinson*, [1909] A. C. 118.

A debenture holder who has brought an action to enforce his security, and has obtained the appointment of a receiver, is not thereby precluded from presenting a petition to wind up the company (*p*). Chap. VI.
Petition to
wind up.

The appointment of a receiver for debenture holders is not a special circumstance to cause the court to depart from its practice of refusing a winding-up order where the petitioning creditor's debt is under £50 (*q*).

The appointment of a receiver and payment into court of the proceeds of sale of property subject to the trusts of a debenture trust deed, does not necessarily determine the right of the trustees to remuneration and a lien therefor (*r*), even though trustees may have a specific power to appoint a receiver and delegate their powers to him (*s*). The terms of the trust deed must be considered in each case (*t*).

Where two directors of a company, who were entitled to a share in certain sums payable for remuneration to the whole body of directors, had been appointed receivers and managers of the company's business, and had become entitled to remuneration for so acting, it was held that they were nevertheless entitled to their remuneration as directors up to the date of a winding-up order (*u*).

(*p*) *Re Borough of Portsmouth Tramways Co.*, [1892] 2 Ch. 362.

(*q*) *Re Industrial Insurance Co.*, [1910] W. N. 245.

(*r*) *Re Piccadilly Hotel, Ltd.*, [1911] 2 Ch. 534.

(*s*) *Re British Cons. Oil Corp., Ltd.*, [1919] 2 Ch. 81.

(*t*) *Re Piccadilly Hotel, Ltd.*,

supra; *Re Anglo-Canadian Lands Ltd.*, [1918] 2 Ch. 287, distinguishing *Re Locke and Smith*, [1914] 1 Ch. 687; *Re British Cons. Oil Corp.*, *supra*.

(*u*) *Re South-Western of Venezuela Ry. Co.*, [1902] 1 Ch. 701.

CHAPTER VII.

POWERS AND DUTIES OF A RECEIVER.

Chap. VII. THE general duty of a receiver may be said to be to take possession of the estate, or other property, the subject-matter of dispute in the action, in the room or place of the owner thereof; and, under the sanction of the court, when necessary, to do all such acts of ownership, in relation to the receipt of rents, compelling payment of them, management, letting lands and houses, and otherwise making the property productive for the parties to be ultimately declared to be entitled thereto, as the owner himself could do if he were in possession, and in certain cases to effect a realisation.

Notice of the appointment should be given immediately to all debtors to the person over whose estate the receiver is appointed, requiring them to pay the debts to the receiver; also to all tenants, requiring them to pay their rents to him.

Parties
required
to deliver
up possession.

Where parties to an action are directed by the order appointing a receiver to deliver up to him possession of such parts of the property as are in their holding, the receiver, as soon as his appointment is complete, should apply to them to deliver up possession accordingly. If any of them refuse to do so, the receiver should report the refusal to the solicitor of the party having the conduct of the proceedings, who should then serve the refusing parties or party personally with the order directing possession to be delivered up (a). A time within which the delivery of possession is to be made must be specified

(a) *Green v Green*, 2 Sim. 430.

in the order, and the order must be endorsed in the manner Chap. VII. prescribed by R. S. C. Ord. 41, r. 5 (b).

If possession is still withheld from the receiver, an application should be made, by motion *ex parte*, for a writ of possession to put the receiver in possession pursuant to the order; and the application should be supported by an affidavit of service of the order, and of non-compliance (c). The writ cannot, however, be issued unless the explicit directions of R. S. C. Ord. 41, r. 5, with respect to the contents and endorsement of the order directing the delivery up of possession, have been complied with (d). If thought fit, proceedings may be taken for contempt.

Where chattels are concerned a writ of delivery may be obtained (e). The old Chancery remedy by way of writ of assistance, although in a great measure superseded by the writ of possession (R. S. C. Ord. 47), is still available in cases not met by R. S. C. Ord. 48, *e.g.*, where chattels, such as documents, are in peril, and a receiver appointed by the court is unable to serve the respondent or to obtain possession, the respondent having absconded and his clerks declining to give up the custody of the documents (f), or where the respondent was in prison for contempt and the securities required were in his possession or in a locked safe in his office (g).

If any party to the proceedings who is in possession of the property in question, or any part of it, is not ordered to deliver up possession to the receiver, he is not bound

(b) *Savage v. Bentley*, [1904] W. N. 89; 90 L. T. 641.

(c) R. S. C. Ord. 47.

(d) *Savage v. Bentley*, [1904] W. N. 89, 90 L. T. 641.

(e) R. S. C. Ord. 48.

(f) *Wyman v. Knight*, 39 Ch. D. 165, *q.v.* for form of order.

(g) *Re Taylor*, [1913] W. N. 212.

Chap. VII. to do so ; but he will be charged with an occupation rent for the property in his possession (*h*) ; such occupation rent to be paid only from the date of demand of possession by the receiver, and not from the date of the order appointing the receiver (*i*). A person in possession will not be ordered, on interlocutory motion before trial, to pay an occupation rent for a period antecedent to the order fixing the occupation rent. That order is the origin of his tenancy, and consequently his liability to pay rent can only commence as from the date of the order (*k*).

Tenants
should be
required
to attorn.

If tenants in possession of real or leasehold estates, over which a receiver is appointed, are directed by the order to attorn to the receiver (*l*), the receiver should, as soon as his appointment is complete, call on them to attorn accordingly (*m*).

If any tenant refuses to attorn to the receiver, the party prosecuting the order should serve him personally

(*h*) *Randfield v. Randfield*, 31 L. J. Ch. 113.

(*i*) *Yorkshire Banking Co. v. Mullan*, 35 Ch. D. 125.

(*k*) *Lloyd v. Mason*, 2 M. & C. 487, at p. 488.

(*l*) *Supra*, p. 180.

(*m*) The attornment to a receiver appointed by the court constitutes a tenancy by estoppel between the tenant and the receiver, which the court applies to the purpose of collecting and securing the rents till a judgment can be pronounced, taking care that the tenants shall be protected, both while the receiver continues to act, and

also when, by the authority of the court, he is withdrawn : *Evans v. Mathias*, 7 E. & B. 602. The attornment creates a tenancy between the tenant and the receiver only, and does not enure for the benefit of the person who may ultimately be found to be entitled to the legal estate, so as to enable him to distrain : *Ib.* For a case in which a tenant was not estopped by payment of rent to a receiver appointed under the Conveyancing Act, 1881, see *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304.

with a copy of the order for the appointment of a receiver, and of the order or certificate completing the appointment (*n*), and also with a notice in writing, signed by the receiver, requiring him to attorn and pay (*o*). If he still refuses to attorn, the tenant should be served with a summons to attorn and pay within a limited time after service of the order to be made on the summons (*p*).

The person served may appear to the summons, and inform the court whether he is in possession as tenant or not (*q*). If he does not appear, the order will be made upon affidavit of service of the summons, orders, certificate, and notice to attorn, and proof by affidavit of the refusal to attorn (*r*). The order will be made without costs in cases where the tenant had reasonable ground for refusing to attorn (*s*).

A copy of the order, endorsed in the usual manner, is then served personally upon the person thereby directed to attorn (*t*). If the person so served still refuses to attorn, an application should be made for leave to issue a writ of attachment against him (*u*).

(*n*) *Supra*, p. 171.

(*o*) Dan. Ch. Pr., 8th ed., p. 1481; as to form of notice to tenant to attorn, and form of attornment, see Dan. Ch. Forms, 6th ed., 917.

(*p*) As to form of summons for tenant to attorn and pay rent and affidavit in support, see Dan. Ch. Forms, 6th ed., 918: the application should not, as a rule, be made by motion.

(*q*) *Reid v. Middleton*, T. & R. 457; *Hobhouse v. Hollcombe*, 2 De G. & Sm. 208.

(*r*) Dan. Ch. Pr., 8th ed., p. 1481; *Hobson v. Shearwood*, 19 Beav. 575. As to form of affidavit, see Dan. Ch. Forms, 6th ed., 918.

(*s*) *Hobhouse v. Hollcombe*, 2 De G. & Sm. 208. Comp. *Hobson v. Shearwood*, 19 Beav. 575.

(*t*) Dan. Ch. Pr., 8th ed., p. 1481.

(*u*) R. S. C. Ord. 42, rr. 7, 26; Ord. 44, r. 2; or sequestration may issue under Ord. 43, r. 6.

Chap. VII. In cases where it does not clearly appear what is the nature of the interest of a person in possession of property over which a receiver has been appointed, it is not necessary to make him a party to the action. The court will, upon allegation that he is a tenant, treat him as a tenant and require him to attorn, unless he can satisfy the court that he holds possession in some other character (*x*). In *Reid v. Middleton* (*y*) it appeared that a tenant in possession had not agreed to pay any specific rent, and an order was consequently made that an occupation rent should be settled by the Master, and that the tenant should pay the arrears and future payments of the occupation rent.

If a judgment creditor is in possession under his judgment, the court cannot order him to attorn (*z*).

Delivery of documents by solicitor. A solicitor will be ordered to produce and deliver up to a receiver appointed in an administration action documents over which he has a lien for costs (*a*).

Delivery of court rolls. The court will, on the application of the lord of a manor, order the steward, who holds the court rolls as the lord's agent, to deliver them up to the receiver (*b*).

Rents in arrear. The receiver may obtain on summons (*c*) an order for payment to him of all arrears of rent due at the date of his appointment, though the tenant may not have attorned :

(*x*) *Reid v. Middleton*, T. & R. 455.

(*y*) *Ib.*

(*z*) *Davis v. Duke of Marlborough*, 2 Sw. 118.

(*a*) *Re W. Caudery*, 54 S. J. 444; following *Re Hawkes*, [1898] 2 Ch. 1; and see *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. As to right of receiver

for debenture holders to money in the hands of a solicitor in respect of future costs, see *Re British Tea Table Co.*, 101 L. T. 707.

(*b*) *Rawes v. Rawes*, 7 Sim. 624; *Windham v. Giubelei*, 40 L. J. Ch. 505.

(*c*) On notice to tenant: form, Dan. C. F., 6th ed., 918.

the tenant may be ordered to pay the costs of the summons (d). If the tenant pays rent due to a mortgagor before notice of the order, he will obtain a good receipt (e).

A person who admits a sum of money to be due from him to the estate cannot dispute the right of the receiver to collect it (f).

Although a receiver is entitled to all arrears of rent at the date of his appointment, produce not converted into money, which has been separated from the estate before the date of the order, does not belong to the receiver. Where, therefore, a manager of a West Indian estate was appointed, with directions to receive and remit the rents and produce, the consignees were not ordered to pay into court surplus moneys arising from the produce of the estate, which had been severed and shipped to the consignees, but had not been received by them at the date of the order (g).

A receiver appointed previously to the execution of a lease may, though not a party to the lease, bring an action by direction of the judge for rent and arrears of rent, where the rent is reserved to the lessor or his successors or the receiver for the time being appointed to receive the same, and the lease contains a covenant by the defendant with the lessor and his successors, and also with the receiver for the time being, for payment of the rent (h).

When the order directs that the receiver shall keep down the interest of incumbrances, or make any other

Duty of receiver to take proper receipts.

(d) *Hobson v. Shearwood*, 19 Beav. 575.

(g) *Codrington v. Johnstone*, 1 Beav. 520.

(e) See, further, p. 211.

(h) *Lloyd v. Byrne*, 22 L. R.

(f) *Wood v. Hitchings*, 2 Beav. 294.

Ir. 269.

Chap. VII. payments, he must, of course, comply with the order, and the sums so paid by him will be allowed in his accounts. He must, however, take proper receipts from the persons to whom he makes the payments, and it must be remembered that, in passing his accounts, he will be subject to the rules to which all other accounting parties are subject (*i*), and accordingly will be allowed to discharge himself by affidavit only as to payments which are under 40s. : for all other payments he must produce proper vouchers (*k*).

A receiver is only justified in paying to the person named in an order for payment, or on a power of attorney duly executed by him. Express authority for payment in any other way must be shown by the receiver, on peril of being disallowed credit therefor in vouching his accounts. A solicitor having the carriage of the proceedings has not as such, and in the absence of special authority in that behalf, power to give a valid receipt for money ordered to be paid by a receiver to his client (*l*).

Distress. After a tenant has, by attorning to a receiver, created a tenancy between him and the receiver (*m*), the receiver may distrain upon the tenant in his own name, and on his own authority, without leave obtained from the court (*n*). Before attornment the receiver must distrain

(*i*) Dan. Ch. Pr., 8th ed., p. 920.

(*k*) *Ib*.

(*l*) *Re Browne*, 19 L. R. Ir. 133.

(*m*) See *Evans v. Mathias*, 7 E. & B. 602.

(*n*) *Pitt v. Snowden*, 3 Atk. 750; *Bennett v. Robins*, 5 C. & P. 379; see, too, *Morton v. Woods*, L. R. 3 Q. B. 668. A receiver

may employ a bailiff to make a distress: *Dancer v. Hastings*, 4 Bing. 2; 12 Moo. 34. As to distress in cases where a receiver has been appointed by a mortgagee under the power conferred by the Conveyancing Act of 1881, see *Woolston v. Ross*, [1900] 1 Ch. 788; *Serjeant v. Nash, Field & Co.*, [1903] 2 K. B. 304; *infra*, p. 372.

in the name of the person having the legal estate (o). Chap. VII.
 In *Brandon v. Brandon* (p) it was stated to be the practice for the receiver not to distrain without an order, for more than one year's arrears of rent. In that case the motion was for leave to distrain in the names of trustees in whom the legal estate was; apparently, if the tenant has attorned, the receiver may distrain without leave for all rent accrued due during the tenancy (q).

At the instance of a purchaser who had been let into possession a receiver was restrained from distraining for arrears of rent due from a former tenant on the ground that a receiver will not be permitted to utilise the legal estate so as to injure the person having the best title to it (r).

Leave that the receiver may distrain in the name of the person having the legal estate may always be obtained from the court on motion (s), and is now usually obtained on summons. If there is any doubt as to who has the legal right to the rent, the receiver should make an application to the court for directions; but where there is no doubt as to who has the legal right to the rent, it is conceived that the leave of the court to distrain in the name of the person having the legal estate is not generally necessary (t). Where, however, the person having the legal estate is a trustee, and the receiver is a solicitor,

(o) *Hughes v. Hughes*, 3 Bro. C. C. 87; 1 Ves. Jr. 161.

(p) 5 Mad. 473, *per* Leach, M.R.

(q) It is however conceived that where the arrears are of long standing, the receiver will act properly in obtaining a direction before distraining for the whole.

(r) *Re Powers*, 39 W. R. 185.

(s) *Hughes v. Hughes*, 3 Bro. C. C. 87; 1 Ves. Jr. 161. As to form of order, see Seton, 7th ed., p. 763.

(t) *Pitt v. Snowden*, 3 Atk. 750; *Brandon v. Brandon*, 5 Madd. 473.

Chap. VII. the latter should bear in mind that the court may be unwilling to empower him to institute proceedings against a tenant for arrears of rent if the trustee is opposed to that course, and he should therefore abstain from instituting such proceedings on his own authority. A reference to the Master as to the propriety of proceeding in the name of the trustee was refused in such a case (*u*).

Instead of moving that he may have liberty to distrain in the name of the person having the legal estate, the receiver may obtain an order on motion or summons, with notice to the tenants, for payment by the tenants notwithstanding that they may not have attorned (*x*), or he may apply that the tenants do attorn, and that distresses may afterwards be made in his name. If the tenants oppose, on the ground of the pendency of an action for the same rent commenced before the appointment of the receiver, the motion or summons may be ordered to stand over until the action has been tried (*y*).

An application for leave to distrain is usually made by summons in chambers, but it is not usual to draw up an order in such cases, the minute made by the Master of the directions given being deemed sufficient (*z*).

In an old case, where a plaintiff, upon whose application a receiver had been appointed, was proceeding both at law and also in equity, the court would not give leave to

(*u*) *Della Cainea v. Hayward*, M'Clell. & Y. 272.

(*x*) *Hobson v. Shearwood*, 19 Beav. 575; *supra*, pp. 180, 239.

(*y*) *Hobhouse v. Holcombe*, 2 De G. & Sm. 208; as to form of notice of motion for tenant to attorn, and pay rent, and affida-

vits, see Dan. Ch. Forms, 6th ed., 918.

(*z*) Dan. Ch. Pr., 8th ed., p. 1487. As to forms of summonses for leave for receiver to distrain and to bring actions for arrears of rent, see Dan. Ch. Forms, 6th ed., 919.

the receiver to distrain upon the tenants unless the plaintiff Chap. VII.
would undertake to proceed in equity only, because the
tenants might file bills of interpleader (a).

Where a receiver is appointed without prejudice to the rights of any prior incumbrancer, and, at the date of the order, a bailiff is in possession under a distress, the landlord need not apply for leave to proceed with the distress (b).

The abatement of an action in which a receiver has been appointed does not determine the appointment, or suspend the receiver's authority to proceed against the tenants. His authority continues until an order is made for his removal. Until such an order is made, a receiver may distrain or perform his other duties, notwithstanding a total abatement of the action (c).

It was held in Ireland that a tenant, who rescued a distress made by the receiver, would not be attached for the rescue, but that the receiver must proceed at common law or under the statute applicable to the case (d).

A receiver appointed at the instance of the mortgagee of an underlease is the landlord of the premises within the meaning of that term in section 1 of the Landlord and Tenant Act, 1709 (8 Anne, c. 18), and, as such, entitled to be paid by an execution creditor (e), before the latter can proceed with his execution, one year's arrears of rent owing by a tenant; but a yearly sum expressed

(a) *Mills v. Fry*, Coop. 107.

Hog. 171.

(b) *Engel v. South Metropolitan, &c., Co.* (1891), W. N. 31.

(e) *Semble*, neither a receiver appointed over chattels in which the debtor had an equitable interest, nor the creditor would not be an execution creditor within the section: see *Norburn v. Norburn*, [1894] 1 Q. B. 448.

(c) *Newman v. Mills*, 1 Hog. 291; *Brennan v. Kenny*, 2 Ir. Ch. 283.

(d) *Fitzpatrick v. Eyre*, 1

Chap. VII. to be paid for goodwill and fixtures is not rent within the section (f).

Duty of
receiver
appointed
over
personal
property.

Where a receiver is appointed by the court to get in outstanding personal property, it is his duty to collect all that he can get in (g) and to obtain directions for realisation (h). If a receiver of book debts is appointed, he must at once give notice of his appointment to the debtors, in order to take the debts out of the order and disposition of the defendant in the event of his becoming bankrupt (i). A receiver for debenture holders, whose debentures expressly or impliedly confer a power to create a charge in priority to the debentures, cannot obtain priority in respect of a debt due to the company over a person in whose favour a charge thereon has been created, and of whose charge he has knowledge, by giving prior notice to the debtor (k).

An order appointing a receiver of outstanding personal estate generally contains a direction that the parties in whose possession the same may be shall deliver over to the receiver all securities in their possession for such outstanding personal estate, together with all books and papers relating thereto (l). If parties in whose hands such securities and papers are, refuse to deliver them up, the receiver should give notice of the refusal to the party conducting the proceedings, and the latter must take the necessary steps for enforcing the order (m).

(f) *Cox v. Harper*, [1910] 1 Ch. 480.

(g) See p. 237, as to means of obtaining possession.

(h) As to sales by receiver, see p. 228; and as to the power of a receiver appointed to wind up an Irish Loan Society to compromise claims, see *O'Reilly v. Connor*, [1904] 2 I R. 601.

(i) *Rutter v. Everett*, [1895] 2 Ch. 872; *Re Neal*, [1914] 2 K. B. 910; and see, further, p. 218, as to effect of bankruptcy.

(k) *Re Ind, Coope & Co.*, [1911] 2 Ch. 223; and see p. 233.

(l) Seton, 7th ed., p. 725.

(m) Dan. Ch. Pr., 8th ed., p. 1481.

In the performance of his duties and the management of the estate generally the receiver must have regard to the terms of his appointment. If he requires powers additional to those specifically given or implied thereby, he must obtain from the court leave to exercise such powers, as, for instance, power to carry on a business. Generally speaking, a receiver should not initiate or defend or compromise any proceedings, or do any other act liable to involve the estate in expense, or liability, without obtaining specific authority (n), which can be obtained on summons supported by an affidavit of the relevant facts (o).

All applications to the court in respect of estates in the hands of a receiver should, as a general rule, be made on behalf of persons beneficially interested in the estate, and not by the receiver. The receiver ought not, generally, to present a petition, or originate any proceedings in the action (p). The conduct of the action is not nowadays given to a receiver (q). If, owing to any difficulty, an application to the court becomes necessary, the receiver

Applications in respect of the estate should be made by persons beneficially entitled, not by the receiver.

(n) *Ib.* The court will not empower a receiver to sue for debts, unless it appears likely that some fruits may be derived from his doing so: *Dacie v. John*, M'Clell. 575.

(o) Forms of summons for powers, Dan. C. F.: to bring action, p. 625; compromise, 628; defend, 626; to carry on business, 627; to pay debts, 628; enfranchisement, 629; repairs, 628; to convert, 627: as to leases, *infra*, p. 252.

(p) *Miller v. Elkins*, 3 L. J. Ch. 128; *Parker v. Dunn*. 8 Beav. 498; *Ex parte Cooper*, 6

Ch. D. 255. The receiver of the estate of a lunatic ought not to present a petition without the concurrence of the committee: *Re Earl of Kilkenny*, 7 Ir. Eq. 594. If the receiver of an estate proves without leave against the estate of a bankrupt legatee, a debtor to the estate, he thereby discharges the debt, and entitles the legatee, on the annulment of his bankruptcy, to his legacy: *Armstrong v. Armstrong*, L. R. 12 Eq. 614.

(q) *Re Hopkins*, 19 Ch. D. 621.

Chap. VII. should apply in the first instance to the party having the carriage of the order (r), or, it is conceived, if necessary, to any other party, to make the necessary application. If, after he has done so, no application is made, and no proper means are taken to relieve the receiver from his difficulty, or if the matter is so urgent that the purpose of the application would be defeated by delay caused in applying to the parties (s), he may himself apply and will be entitled to his costs (t). In a case in the Court of Chancery, where a receiver had incurred costs in the execution of his duties, and the parties to the suit had for a long time neglected to provide for them, it was held that he was justified in presenting a petition for payment (u).

Where a party to an action is appointed receiver, he is entitled to apply to the court as freely as if he were not holding that office. "A party," said Lord Cottenham, in *Scott v. Platel* (x), "by being appointed receiver, does not thereby lose his privileges as a party to the cause; otherwise by appointing a party receiver you would paralyse the proceedings in the suit."

Right to
sue.

A receiver acquires no right of action by virtue of his appointment: he cannot sue in his own name as receiver, e.g., for debts to a company, or parties over whose assets he has been appointed receiver; nor can the court authorise him to do so (y). In such cases he must maintain the action in the name of the person or persons who would be entitled to sue apart from his appointment (z). A

(r) *Windschuegel v. Irish Polishes, Ltd.*, [1914] 1 Ir. R. 33. (u) *Ireland v. Eade*, 7 Beav. 55.

(s) Cf. *Nangle v. Lord Fingal*, 1 Hog. 142. (x) 2 Ph. 229, at p. 230.

(t) *Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 Beav. 498. (y) *Ex parte Sacker*, 22 Q. B. D. 179; *Rodriguez v. Speyer Bros.*, [1919] A. C. pp. 75, 112. (z) *Rodriguez v. Speyer Bros.*,

receiver may however acquire a right of action to sue in his own name: for instance, as the holder of a bill of exchange (a); or the assignee of a debt which has been actually assigned to him; or by virtue of his possession (b), as, for instance, to recover goods which have been in his possession, or to restrain an electric light company from cutting off the supply to an hotel of which he is in possession (c). In all these cases he acquires a right of action in the course of his receivership, but not in consequence of it alone (d). So, also, a receiver can sue in his own name on contracts under which he has contracted as principal, *e.g.*, in carrying on a business (e).

A receiver is on similar principles a good petitioning creditor in respect of a judgment debt which has been assigned to him, although when received it would fall to be dealt with in the action in which he has been appointed (f); but not in respect of specific sums ordered to be paid to him by a defendant, since he could not sue either at law or in equity for such sums (g).

After a receiver has been appointed by the court at the instance of a mortgagee the court may direct such proceedings as it considers proper to be commenced or carried on by the receiver at the expense of the mortgaged property: neither the mortgagor nor the mortgagee has an absolute right to insist on or prohibit an action being brought. These principles are well

Receiver
as peti-
tioning
creditor.

Action by
receiver of
mortgaged
property.

supra, where the dicta to the contrary in *Rombach v. Gent*, 84 L. J. K. B. 1558, were criticised.

(a) *Ex parte Harris*, 2 Ch. D. 423, explained in *Ex parte Sacker*, *supra*.

(b) *Ex parte Sacker*, 22 Q. B. D. p. 185.

(c) *Husey v. London Electric Supply Corp.*, [1902] 1 Ch. 411.

(d) *Ex parte Sacker*, *supra*.

(e) See *Moss S.S. Co. v. Whinney*, [1912] A. C. 254.

(f) *Re Macoun*, [1904] 2 K. B. 700.

(g) *Ex parte Sacker*, *supra*.

Chap. VII. illustrated in a case (*h*) in which a company had commenced an action against its first mortgagees and a purchaser from them to set aside as fraudulent a sale by the former to the latter : the purchaser, having subsequently acquired the interest of a holder of debentures for £10,000 in the company, commenced in his name a debenture-holder's action against the company and obtained the appointment of a receiver therein. The court on the application of the company ordered the receiver to carry on proceedings in the first action upon the terms that his costs should be a first charge on the company's assets, notwithstanding the protest of the plaintiff in the second action (who was the purchaser's nominee) that assets upon which the purchaser had in effect a first charge would be used to support a claim against him in another capacity (*i*).

As has been already pointed out, if the receiver desires to bring an action, the application is not made by himself but by the party having the conduct (*k*). The application is by summons (*l*). Leave to defend (*m*), compromise (*n*), or discontinue an action must be obtained in the same way. If the cause of action is one vested in the receiver personally, or if an action is brought against him personally, he can sue or defend without leave, but at his own risk as to costs ; he should therefore obtain leave in most cases. Actions by receivers appointed managers are discussed in Chapter IX. (*o*).

Where it becomes necessary for the receiver to obtain leave to sue in the name of a third person such as a

(*h*) *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

(*i*) *Ib.*

(*k*) *Ante*, p. 247.

(*l*) *Form*, Dan. C. F. 625, modified as required.

(*m*) *Form*, Dan. C. F. 626.

(*n*) *Ib.* 628.

(*o*) Pp. 298 *et seq.*

liquidator (*p*) or a trustee in bankruptcy, he will only be allowed to do so on giving the latter a complete indemnity, not one limited to assets in the hands of the receiver (*q*). Chap. VII.

When a receiver is appointed to manage a partnership concern, he must be guided by the terms of the order of appointment, keeping in mind the general maxim that, as his authority flows from the court, he must, in every case not covered by the terms of the order appointing him, act under a special order to be obtained from the court. Receiver of partnership.

The court, by appointing a partner to be receiver, protects his operations, and gives him power to have recourse to the court for assistance and advice, but it does not enable him to do that, as against his partner, which the existing conventions or agreements between the parties do not justify (*r*). A partner appointed receiver is, like other receivers, an officer of the court and must act accordingly (*s*).

Where there was a conflict of interest between the receiver and the separate estate of a partner, whose trustee in bankruptcy the plaintiff was, it was held that the receiver ought not to be represented by the plaintiff's solicitor but by the solicitor for the defendant (*t*).

It is not only in the case of a partnership (*u*) that it may become necessary for the receiver to be advised by a separate solicitor in order that he may hold an even hand between the various parties interested (*x*). But the mere Other cases.

(*p*) As to which, see p. 277, *post*.

(*q*) *Re Grenfell, Ex parte Plender* (1915), H. B. R. 74; *Harrison v. St. Etienne Brewery Co.* (1893), W. N. 108; *Re Westminster Syndicate*, 99 L. T. 924.

(*r*) *Nieman v. Nieman*, 43 Ch. D. 198.

(*s*) See *Davy v. Scarth*, [1906] 1 Ch. 55.

(*t*) *Bloomer v. Curie*, 51 S. J. 277.

(*u*) See *Bloomer v. Curie*, *supra*.

(*x*) See, for instance, *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305.

Chap. VII. fact that he consults a solicitor who is also party, provided the advice is proper, does not necessarily invalidate a transaction with regard to which the advice is given, as against other parties (*y*). If the receiver desires to employ a separate solicitor, except in the matter of vouching his own accounts (*z*), he should obtain the leave of the court on his own application if necessary (*a*).

That the receiver appointed in an action should be made a party to proceedings in it, is in some cases necessary. Thus, if the receiver pays money in his hands to the solicitors of the plaintiff, who are also his own solicitors, without any previous instructions as to the specific application of the money, it is to be considered to be paid to them as the solicitors (not of the plaintiff, but) of the receiver, and the receiver must be made a party to an application for payment into court of the money by the solicitors (*b*).

Power of leasing. It was formerly a motion of course to give liberty for a receiver to set (*c*) or let. An express power to that effect was afterwards inserted in most orders (*d*). By an Order made in April, 1828, it was ordered that, in any order directing the appointment of a receiver of a landed estate, there should be inserted a direction that he should have power to set and let with the approbation of the Master, who was empowered, without the special order of the court, to receive and report on proposals from the parties

(*y*) See *Re Rogerstone Brick, &c.*, J. 501; *Ind, Coope & Co. v. Kidd*, 63 L. J. Q. B. 726.

(*z*) As to which, see p. 331, (*c*) *Quære* whether "set" is synonymous with "let," see *Greenaway v. Adams*, 12 Ves. 395.

(*a*) See p. 248, *ante*.

(*b*) *Chater v. Maclean*, 1 Jur. 395.
N. S. 175; see, too, *Dixon v. Wilkinson*, 4 Drew. 614; 4 D. & 304 n.

(*d*) *Neale v. Bealing*, 3 Sw.

interested for the management or letting of the estate (e). Chap. VII.
 At the present day, a direction to manage or set and let is not inserted in an order appointing a receiver over real or leasehold estate, the judge having power to give any direction in chambers as to the management of the estate (f).

Under the old practice, the course of the court was to order the Master to receive proposals as to leases of property over which a receiver had been appointed, and to report his opinion thereon. The court did not delegate to the Master the power of approving or sanctioning leases. The order was simply that he should receive proposals for leases, and report his opinion thereon to the court (g). A receiver could not, without the sanction of the court, set or let (h) even for a single year (i); and a lease made without the Master's consent was invalid (k). The case of *Shuff v. Holdway* (l) was formerly cited as authority for the proposition that a receiver can now, without obtaining the sanction of the court, let for a period not exceeding three years; but the Court of Appeal has now laid it down that no valid lease can be made by a receiver without the sanction of the court; though the court can approve any lease which it considers necessary for the protection of, or making fruitful, the property over which a receiver is appointed (m).

(e) See *Thornhill v. Thornhill*, 14 Sim. 600; *Duffield v. Elwes*, 11 Beav. 590.

(f) Seton, 7th ed., 725; see, too, R. S. C. Ord. 55.

(g) *M'Dermott v. Kealey*, Jac. 374; *Symons v. Symons*, 2 Y. & C. 1.

(h) 1 Ves. Jr. 138.

(i) *Wynne v. Lord Newborough*, ib. 164.

(k) *Durnford v. Lane*, 2 Madd. Ch. Pr., 2nd ed., 244.

(l) Seton, 7th ed., 769.

(m) *Anon.*, cited *arguendo* in *Stamford, &c., Banking Co. v. Keeble*, [1913] 2 Ch. p. 98.

Chap. VII. If a receiver himself grants a lease without sanction, the lease will be binding as between him and the person who takes the lease by estoppel (*n*). As between the lessee, however, and the owner of the legal estate, the lease has, in the absence of special circumstances, no binding force, even though it may have been made with the sanction of the judge. The powers of the receiver are limited to receiving proposals and making arrangements as to the leasing of the property over which he has been appointed receiver (*o*). He has no power to transfer the legal estate in the property, nor can such a power be given to him by the judge (*p*). Leases of property in the hands of a receiver should be made or signed by the person having the legal estate or power of leasing. If necessary, recourse may be had to any of the statutory provisions which confer jurisdiction on the court to sanction leases (*q*).

A receiver should apply for liberty to re-let before an existing lease expires. If he neglects to do so, he is at liberty to make what he can of the property during the current year, but he will be visited with any loss which may arise (*r*).

Where the court directs a receiver to give to any person the option of being tenant of some particular item of property, it generally reserves power to the receiver to inspect the state and condition of the property (*s*).

In cases where the estate over which a receiver is appointed is in the East Indies, a colony, or a foreign

(*n*) *Dancer v. Hastings*, 4 Bing. 2; 12 Moo. 34. (*q*) Dan. Ch. Pr., 8th ed., p. 1488, and Chap. 37.

(*o*) See p. 180.

(*r*) *Wilkins v. Lynch*, 2 Moll.

(*p*) See *Gibbins v. Howell*, 3

499.

Madd. 469; *Evans v. Mathias*, 7 E. & B. 602; *supra*, p. 228.

(*s*) *Baylies v. Baylies*, 1 Coll. 545.

country, it is usual to give the receiver more extensive powers of managing and letting than in the case of estates situated in this country (t). A reference to the Master is generally directed, to inquire what should be the term, beyond which the receiver should not be permitted to let. This is done with the view of obviating the necessity of a series of applications to the court for permission to let (u).

A receiver must let the estate over which he is acting as receiver to the best advantage. He is bound to obtain the best terms (x). He may not, either in his own name or through the medium of a trustee (y), become tenant of any part of the estate over which he is acting as receiver (z). A receiver cannot raise the rents on slight grounds without the leave of the court (a), nor can he abate the rents, or forgive the tenants their arrears, without the consent of the parties beneficially interested (b).

Applications with reference to property under the management of a receiver are usually made by summons at chambers. The judge at chambers receives proposals for the management and letting of the property from the parties interested, and gives his directions thereon.

The usual course is for the proposed tenant of any part of the property to enter into a provisional agreement to become tenant or lessee of it upon terms specified

Mode in which proposals for leases are dealt with.

(t) *Morris v. Elme*, 1 Ves. Jr. 139.

(u) *Anon. v. Lindsay*, 15 Ves. 91.

(x) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164.

(y) See also p. 285.

(z) *Meagher v. O'Shaughnessy*, cit. Fl. & K. 207, 224; see, too,

Anderson v. Anderson, 9 Ir. Eq. 23; *Eyre v. M'Donnell*, 15 Ir. Ch. 534. Comp. *King v. O'Brien*, 15 L. T. 23.

(a) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164.

(b) *Evans v. Taylor*, Sau. & Sc. 681.

Chap. VII. in the agreement, subject, however, to the approval of the judge. A summons for an order to carry the agreement into effect is then taken out by the plaintiff's solicitor and served on the parties interested. The application is supported by the production of the agreement and the affidavit of a land agent, or other competent person, stating the grounds on which, in his judgment, the agreement should be adopted. The power to demise on the terms specified should also be shown by proper evidence. If the agreement is approved, either an order is made directing it to be carried into effect, and that the lease to be granted in pursuance thereof be settled by the judge, either absolutely or in case the parties differ; or, to save expense, the Master endorses a minute of the approval on the summons, and adjourns the matter until the draft lease has been brought in for approval. Upon the draft lease, or a certified copy of the order (if any) approving the agreement, being left at chambers, a summons is taken out to settle the draft lease (c); or, if no order has been drawn up, an appointment for this purpose is given. The summons, or notice of the appointment, is then served on the parties interested. The draft lease is then settled either by the judge or by the Master, with the assistance, if necessary, of one of the conveyancing counsel. The draft is then engrossed in duplicate, and an affidavit is made, verifying the engrossment of the lease, and that of the counterpart, as being each a true and correct transcript of the draft as settled. A copy of this affidavit is left at chambers, with the engrossments and draft. The Master

(c) As to forms of summons in support, and form of summons to approve of agreement to settle draft lease, see grant a lease, and of affidavits Dan. Ch. Forms, 6th ed., 630, 631.

then signs a memorandum of allowance in the margin of each engrossment, and issues his certificate of the result of the proceeding, which is completed in the usual way ; or, if an order approving the agreement has been drawn up, an order is made approving the agreement and the lease. Where, as is often the case, the draft lease is settled at chambers before an order approving the agreement has been drawn up, the order may include an approval of the engrossments, thereby saving the expense of a certificate, which, indeed, is often dispensed with, the Master's memorandum of allowance, in the margins of the engrossments, being deemed sufficient evidence of the fact of the lease having been settled by the judge (d).

Where, however, the property is shown to be most advantageously let on a number of weekly or quarterly, or even yearly tenancies, a general authority would probably be given, with limitations as to term and rent (e).

A receiver appointed by the court over lands, with a general authority to let the lands from year to year, has thereby an implied authority to determine such tenancies by regular notices to quit (f). In *Mansfield v. Hamilton* (g) Lord Redesdale said that, the tenants of an estate being under the circumstances of that case tenants from year to year to the receiver, he would not turn them out without notices to quit.

Power of receiver to give notice to quit.

(d) As to form of affidavit verifying engrossments of lease and counterpart, form of certificate of settlement of lease, and minutes of order approving an agreement and the lease to be issued in pursuance thereof, see Dan. Ch. Forms, 6th ed., p. 632 ; see, too, Dan. Ch. Pr., 8th

ed., p. 932.

(e) See *Anon. v. Lindsay*, 15 Ves. 91.

(f) *Doe v. Read*, 12 East, 61 ; *Crosbie v. Barry*, Jon. & C. 106 ; *Wilkinson v. Colley*, 5 Burr. 2697 ; *Jones v. Phipps*, L. R. 3 Q. B. 572.

(g) 2 Sch. & Lef. 30.

Chap. VII. If a tenant holds over after regular notice to quit given to him by a receiver, the court will give the receiver leave to sue the tenant for double the yearly value of the premises, under the statute 4 Geo. 2, c. 28, s. 1 (*h*).

Statute-
barred
debts.

If a receiver has power to pay debts, he may pay an instalment of a debt, even though the effect of his doing so may be to stop the Statute of Limitations from running (*i*). But a payment made by a receiver, which is not authorised by the order appointing him, will not stop the statute from running (*k*); nor will payment by a person administering the estate of a person of unsound mind without an order appointing him receiver (*l*). A receiver must not pay statute-barred debts, if not specifically authorised to do so, unless the statute has not run at the date of his appointment; even in the latter case he should apply for directions (*m*).

If a receiver directed to keep down interest on a prior incumbrance makes overpayments through a mistake of fact, such as ignorance of a proviso for a reduction of the rate on punctual payment, the person to whose prejudice the over-payments were made can recover them from the mortgagee, up to a period of six years before action (*n*).

(*h*) *Wilkinson v. Colley*, 5 Burr. 2694.

(*i*) *Re Hale, Lilley v. Foad*, [1899] 2 Ch. 107; and see *Wandsworth Union v. Worthington*, [1906] 1 K. B. 420, where payment to guardians by a receiver under an order in lunacy of the income of the lunatic's estate (which was insufficient to discharge the sums due for maintenance) was held to take a claim for arrears of

maintenance out of the statute.

(*k*) *Whitley v. Lowe*, 25 Beav. 421; 2 D. & J. 704.

(*l*) *Re Beavan*, [1912] 1 Ch. 196.

(*m*) See *Re Fleetwood and District Electric Light and Power Syndicate*, [1915] 1 Ch. 486; and see *Hibernian Bank v. Yourrel*, [1919] 1 Ir. R. 310.

(*n*) See *Re Jones' Estates*, [1914] 1 Ir. R. 188.

A receiver appointed on behalf of a mortgagee is the Chap. VII.
 "agent" of the mortgagor within the statute 3 & 4
 Wm. 4, c. 27, s. 40, and a payment of interest by him
 stops the running of the statute (o).

The receiver of the property of a criminal lunatic
 must pay to the Crown all arrears due under sec-
 tion 10 (3) of the Criminal Lunatics Act, 1884 (47 &
 48 Vict. c. 64), in respect of the maintenance of the
 lunatic, the Statute of Limitations not applying to such
 a case (p).

It is not proper for a receiver to defend, without sanction, Receiver
 actions which may be brought against him (q). In a ^{must not}
 case where a receiver had, without the authority of the ^{defend}
 court, defended an action arising out of a distress made ^{without}
 by him upon a tenant of the estate for rent, and was ^{leave.}
 unsuccessful, the court refused to allow him his costs
 of the action (r). But if he successfully defends an
 action brought against him, without putting the estate
 to the expense of an application to the court, which
 he might have made for his own security, he will stand
 in the same position as to indemnity as if he had made
 that application (s).

(o) *Chinnery v. Evans*, 11
 H. L. C. 115.

(p) *Re J.*, [1909] 1 Ch. 574.

(q) *Anon.*, 6 Ves. 287; *Swaby*
v. Dickon, 5 Sim. 629. The
 receiver should not wait to apply
 for leave to defend an action
 until just before trial: *Anon.*,
 6 Ves. 286.

(r) *Swaby v. Dickon*, 5 Sim. 629;
 see *Re Montgomery*, 1 Moll. 419.

(s) *Bristowe v. Needham*, 2
 Ph. 190, 191. But whether he

will, in any particular case, be
 indemnified in respect of his
 costs of defence will depend
 upon the nature of the action:
 see *Re Dunn*, [1904] 1 Ch. 648;
infra, p. 324. If the possession
 of a tenant under a receiver is
 disturbed, and no application is
 made to the court to prevent
 the disturbance, the tenant is
 entitled to the costs of protecting
 his own possession: *Miller v.*
Elkins, 3 L. J. Ch. 128.

Chap. VII. Again, a receiver must not, without the leave of the court, bring an action for the recovery of land (*t*).

A motion by the tenants of an estate, to restrain a receiver from doing acts which are within his authority, will be refused with costs; for they have no sufficient interest to support it (*u*).

A receiver of the rents and profits of real and leasehold estate may with propriety insure the property against damage by fire, either in his own name or in the names of trustees, and he will be allowed in his accounts the premiums which he has paid (*x*).

Power of
receiver as
to repairs.

A receiver appointed by the court may lay out small sums of money in customary repairs, or may allow the same to a tenant, but he may not apply money in repairs to any considerable extent without a previous application to the judge (*y*). It was at one time a rule of the Court of Chancery that the receiver of an estate could not lay out any money on it without a previous order of the court (*z*). At the present day the rule of the court is not so strict; but, speaking generally, it is conceived that a receiver ought not to expend at his own discretion, and without the sanction of the judge, more than £30 a year (*a*), though there is no exact rule as to the amount of

(*t*) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164; 3 Bro. C. C. 87; *Ward v. Swift*, 6 Ha. 312.

(*u*) *Wynne v. Lord Newborough*, 3 Bro. C. C. 88; 1 Ves. Jr. 164.

(*x*) *Re Graham, Graham v. Noakes*, [1895] 1 Ch. 66, 71.

(*y*) *Waters v. Taylor*, 15 Ves. 25; *Ex parte Izard*, 23 Ch. D. 80.

(*z*) *Tempest v. Ord*, 2 Mer. at

p. 56.

(*a*) Dan. Ch. Pr., 8th ed., p. 1488, note (*o*). Where the amount proposed to be expended by the receiver is small, the sanction of the judge will be given on production to the Master of a letter from the receiver, stating the propriety of the intended expenditure, and the maximum amount to be laid out: *ib*.

repairing that he may do upon his own responsibility (b). Chap. VII.
 If, however, more has been expended by him than a receiver is authorised to expend at his own discretion, the course of the court is to direct an inquiry into the circumstances of the expenditure, and to allow the amount expended, if, upon inquiry, the expenditure is found to have been reasonable, and beneficial to the estate (c).

Under the Rules of the Supreme Court, applications as to repairs are made to the judge in chambers, where the matter is inquired into, without previous order, before the repairs are authorised to be done (d).

If from their extent, or the circumstances under which money for repairs is claimed, the receiver feels any difficulty in allowing them to be done, he should apply to the plaintiff's solicitor to obtain the sanction of the judge. In order to obtain it, the plaintiff's solicitor takes out a summons, to the effect that the receiver appointed in the action may be directed to execute the repairs specified in the affidavits, and to expend moneys not exceeding a certain specified sum of money, the estimated cost thereof, and that he may be allowed the amount he may so expend in passing his accounts in the action. The summons is supported by evidence that the tenants are not liable to do the repairs, that the repairs ought to be done, and that the amount proposed to be expended is

(b) *Re Graham, Graham v. Noakes*, [1895] 1 Ch. 66, 72.

(c) *Att.-Gen. v. Vigor*, 11 Ves. 563; *Tempest v. Ord*, 2 Mer. 56; *Ex parte Izard*, 23 Ch. D. 80. *Comp. Re Langham*, 2 Ph. 299.

(d) R. S. C. Ord. 55, r. 2 (13), which applies to all applications

connected with the arrangement of property, including directions as to letting, and cutting and selling timber. See, too, *Seton*, 7th ed., p. 770; and, as to order giving the receiver liberty to expend money in repairs, *ib.* p. 765.

Chap. VII. fair and reasonable. The order is drawn up by the registrar in the usual way.

If a receiver requires money to enable him to discharge his duties, the court will give him leave to borrow upon the security of the property in his hands. This power is most frequently exercised in the case of a receiver and manager appointed in debenture-holders' actions (e).

A receiver in lunacy who was plaintiff in an action relative to certain property of the lunatic, upon which were mortgages which the mortgagee was threatening to call in, was, on application being made in the action, authorised to borrow upon security of the lunatic's property sufficient money to pay a commission to a proposed transferee of the mortgages as a consideration for his consenting to take the transfer (f).

Various applications as to the management of the estate.

An order may be obtained in chambers, authorising a receiver to cut and sell timber, and to employ it, if necessary, in repairs (g). The court, before giving liberty to cut timber for repairs, will direct inquiries (h). Where there is a receiver, a sale of timber is usually effected under his direction (i). The receiver of an estate may obtain an order to grant a licence to win and get clay and brick earth on the estate, and to manufacture the same into bricks (k). But the court has no jurisdiction in a foreclosure action to sanction the grant of a licence to work deposits of peat, which amounted in effect to a sale of the surface by instalments, nor to sanction mining leases other than such as are authorised by statute (l).

(e) See *post*, p. 304, where the matter is treated at length.

(f) *Chaplin v. Barnett*, 28 Times Rep. 256; this order was made under R. S. C. Ord. 50, r. 3.

(g) Seton, 7th ed., p. 766.

(h) *Ib.* 770.

(i) *Ib.* 766.

(k) *Ib.* 766.

(l) *Stamford Banking Co. v. Keeble*, [1913] 2 Ch. 96.

An application by a person not a party to the action, Chap. VII. for directions as to the management of real property by a receiver, may be made by summons at chambers (m).

Where the estate of a stranger has come into possession of the receiver in an action, and possession of it has been held by him with the acquiescence of such of the parties to the action as are not under disability, and without objection on behalf of any party under disability, the transaction is binding on all those parties ; the stranger will be ordered to be compensated out of the fund in court in respect of any rents of the stranger's estate received by the receiver and not paid over to the stranger, and also in regard to any dilapidations during the receiver's possession, since the stranger has a right against the fund by subrogation to the receiver's right of indemnity (n). This may be ordered on the application of the stranger, although he be not a party to the action (o).

If, after a receiver has been appointed, a person has entered into an agreement with the receiver to take the lease of a farm, an action need not be brought to restrain the lessee from committing waste. The court will, on the application of the plaintiff in the action, grant an injunction, on motion in a summary way, against the lessee, notwithstanding that he be not a party to the action (p).

(m) *O'Hagan v. North Wingfield Colliery Co.*, 26 Sol. J. 671 ; and see *Searle v. Choat*, 25 Ch. D. 723.

(n) *Neate v. Pink*, 15 Sim. 452 ; S. C. 3 Mac. & G. 476, 484, explained in *Hand v. Blow*, [1901] 2 Ch. at p. 728 ; comp. *Brocklebank v. East London Railway Co.*, 12 Ch. D. 839. *Quære* whether,

if the fund remaining in court is insufficient, the stranger could recover from the parties into whose hands the money had come, see *Re Jones' Estates*, [1914] 1 Ir. R. 188, and *post*, p. 407.

(o) *Ib.*, and see p. 199, *ante*.

(p) *Walton v. Johnson*, 15 Sim. 352 ; see, too, *Casamajor v. Strode*, 1 Sim. & St. 381.

Where estate of stranger comes into possession of receiver.

Lessee of land in possession of receiver restrained from committing waste.

Chap. VII. But, in a case which came before Shadwell, V.-C., in the year 1846, an incumbrancer on an annuity, which a receiver in the suit had been directed to pay to the annuitant, was refused an order, on his petition in the suit, for payment of his debt by the receiver out of the moneys payable to the annuitant. The incumbrancer not being a party to the suit, and the annuitant opposing the petitioner's prayer, the Vice-Chancellor held that he had no jurisdiction on the petition, and that a bill must be filed (q).

Receiver of lease-holds generally. As has already been pointed out, a receiver over lease-holds is bound in the first place, out of the sub-rents, to discharge the head-rent and outgoings payable to a lessor, for which the person whose estate is being dealt with by the court is actually liable to that lessor.

If, in consequence of the receiver's default, the head-lessor is compelled to institute proceedings for the recovery of the head-rent, the receiver is held liable for costs, if sub-rents have reached his hands. The sub-rents should be, in the first place, appropriated to the payment of the head-rent. If the receiver pursues a different course, and pays away sub-rents received without providing for the head-rent, choosing to speculate upon obtaining other funds wherewith to pay the latter, he does not act in accordance with the course of the court, and he will be compelled by the court to pay any arrears of the head-rent (r).

Receiver of lease-holds mortgaged by sub-demise. But the above principle does not apply where the receiver has been appointed at the instance of a mortgagee between whom and the lessor or head-lessor there is no such privity

(q) *Wastell v. Leslie*, cited 15 R. 365; *Jacobs v. Van Boelen*, Sim. 453. 34 Sol. J. 97.

(r) *Balfe v. Blake*, 1 Ir. Ch.

as to make the mortgagee liable to pay rent or other outgoings to such lessor or head-lessor, as in the case of a mortgage by sub-demise or by way of equitable charge ; the receiver is not, any more than the mortgagee in whose right he was appointed, liable, whether in possession or not, to the lessor or head-lessor for rent or other outgoings. There is no equity entitling the lessor to claim rent, or damages for breach of (for instance) a repairing covenant in the lease, from the receiver by reason of his having occupied the mortgaged premises, even though he has, under an order of the court, sold off the mortgagor's goods and so in effect deprived the lessor of a remedy by distress : there is no principle of honour, honesty or justice requiring the court to interfere in such a case (s) ; nor, if the receiver has sold the leaseholds, has the lessor any remedy against the fund in court (t).

If there is uncertainty as to the amount of rent due to the head-lessor, the receiver should cause an application to be made for directions ; if he waits until the head-lessor makes an application on the subject, he may appear by his solicitor, state the facts, and have the court's order accordingly.

If the lessor has recovered judgment for possession, rent and mesne profits against the lessee, he cannot

(s) *Hand v. Blow*, [1901] 2 Ch. 721. In *Neate v. Pink*, 3 Mac. & G. 476, the court appears to have treated the relationship of landlord and tenant as subsisting in the circumstances between the lessor and the receiver, which thus gave the former a right by subrogation against the fund : see judgment of Stirling, L.J., in *Hand v. Blow*, *supra*. The

receiver is not stopped by having paid one instalment of the rent : *Justice v. James*, 15 Times Rep. 187.

(t) *Re J. W. Abbott & Co.*, [1913] W. N. 284 ; but it is submitted a reasonable sum in respect of the receiver's occupation would be paid to the lessor : see *Neate v. Pink*, *supra*.

Chap. VII. recover rent from a person who is actually in possession, such as a receiver for debenture holders of a company entitled in equity to the lease (*u*). Inasmuch as the court will in a proper case direct its officer to do what is right and honourable (*x*), though it does not profess to cure all the inconveniences caused by the appointment of a receiver (*y*), it will, it is submitted, not allow a receiver to retain rents from sub-tenants without paying a head-rent, even though there is no actual liability on the mortgagees to pay such head-rent as between them and the head-lessor, since otherwise the sub-tenants would be exposed to distress and forfeiture: in such a case, it seems, the head-rent would be ordered to be paid out of the fund (*z*); and if the receiver has elected to remain in possession and receive a profit rental under a lease in respect of which the company was liable directly to the lessee, *semble* that the receiver will be ordered to pay to the lessor out of moneys in his hands the amount of dilapidations due on the determination of the lease, though the lessor may not be entitled as of right to such payment (*a*).

Income
tax deduc-
tion.

Where a receiver appointed at the instance of an equitable mortgagee has entered into a tenancy agreement

(*u*) *Re Westminster Motor Garage Co.*, 84 L. J. Ch. 753.

(*x*) As to which see *Hand v. Blow*, *supra*; *John Griffiths' Cycle Corp.*, [1902] W. N. 9 (refusal of application by successful appellants to House of Lords for receiver to pay money paid into court by him as security for costs of appeal to C.A., and paid out to him, on appeal succeeding in the C.A.); see also *Re Abdy*, [1919] 2 K. B. 735.

(*y*) *Per Collins, M.R.*, in *Hand v. Blow*, *supra*.

(*z*) See judgment of Stirling, L.J., in *Hand v. Blow*, *supra*, and cases cited therein; *Re Levi*, [1919] 1 Ch. 416: in most cases the payment would be necessary to prevent forfeiture of a beneficial lease.

(*a*) *Hand v. Blow*, [1901] 2 Ch. 736; see *Re Levi*, [1919] 1 Ch. 416.

with the lessor to the mortgagor, he is entitled to deduct Chap. VII. from rent payable by him, not only income tax under Schedule A payable by him for that year, but also arrears of such tax for a previous year paid by him and not deducted from the rent for such year, though the rent for such year is unpaid (b): application for recovery of any part of the duty on account of the rent for the year of its assessment being irrecoverable, should be made by the lessor, not the receiver (c). Similarly, an agreement by a receiver to pay an occupation rent and arrears of rent does not preclude him from deducting payments for income tax made by himself and the company in previous years and not previously deducted from the rent of a subsequent year (d).

Although there is no obligation to pay rent which can be enforced against a receiver or the fund, where the receiver is appointed on application of a mortgagee by sub-demise or an equitable incumbrancer, the lessor has powers of distress and re-entry, which he can exercise with the leave of the court, and it will often be necessary for the receiver to obtain leave to pay such rent in order to safeguard the property or goods on the premises.

Where a receiver for debenture holders had a debt due to the Crown to avoid distraint it was held that he could not claim to be paid a sum, equal to the amount of the discharged debt, out of money, due from the Crown

- (b) *Re Hayman, Christy and Lillie* (No. 2), [1917] 1 Ch. 545. for unpaid property tax, see *Macgregor v. Clamp*, [1914] 1 K. B. 288; inhabited house duty, *Eastwood v. MacNab*, [1914] 2 K. B. 361.
- (c) *Ib.*, p. 549.
- (d) *Re Sturmev Motors, Ltd.*, [1913] 1 Ch. 16. As to distress

Payment
by receiver
to avoid
distress.

Chap. VII to the company, which had been assigned to third persons (e).

If the receiver himself makes or confirms a tenancy agreement under which he occupies, he is personally liable for the rent under it, as in the case of other contracts made by him, and the landlord can claim by subrogation against the fund (f).

Duty
when
tenants
interfered
with.

When the receiver is informed by tenants that defendants have interfered with the rents it is his duty to move for an attachment; and it is sufficient if he swears that he had the information from the tenants, and that he believes it (g). The interference of the owner of the inheritance with the rents does not exempt the receiver from being charged with the whole amount: in order to discharge himself he must show what the owner of the inheritance received, or hindered him from getting (h).

Duty of
receiver
not to
interfere
between
the
parties.

The receiver appointed in an action ought not to interfere in any litigation between the parties to it. If he does, he will not be allowed the costs of a motion for such a purpose. It is the receiver's duty to receive and collect rents and other moneys without raising any controverted question between the parties (i).

Payment
of interest
to incum-
brancers
out of
rents and
profits.

If a receiver is appointed at the instance of a puisne mortgagee or judgment creditor, it is no part of his duty without directions to apply any part of the rents in keeping down interest on prior incumbrances. Where, however, he is appointed over a trust estate or the estate of an infant or in similar cases, and also where he is directed

(e) *Re Ind, Coope & Co.*, [1911] 2 Ch. 223; *quære* whether one debt could have been set off against the other before payment.

(f) See p. 302.

(g) *Anon.*, 2 Moll. 499.

(h) *Hamilton v. Lighton*, 2 Moll. 499.

(i) *Comyn v. Smith*, 1 Hog. 81.

to keep down the interest on incumbrances, he ought, Chap. VII. except under very special circumstances, so far as the rents and profits will go, to pay them on account of the interest of the several incumbrancers in the order of their priority (*k*).

Trade machinery and fixtures, a right to remove which ^{Trade fixtures.} belongs to a lessee as against his lessor, pass with the land to a mortgagee of the leasehold interest, who can sell them with the land, though he has no right to sever them from the land during the term ; if, however, he severs and sells them apart from the land they do not revest in the mortgagor, who has no right to the proceeds of sale, but only a possible claim for damages. Where therefore a receiver for debenture holders had consented to a sale of the fixtures by a prior mortgagee, the debenture holders had no claim to the proceeds of sale (*l*). If the receiver of a business, carried on on leasehold premises during the term, sells machinery and plant, the right of the tenant to which has been negatived by the terms of the lease, the landlord has a right to affirm the sale and recover the proceeds without waiting for the end of the term (*m*).

A mortgagee has a reasonable time to remove trade fixtures after the lease has determined, and therefore in a case in which, after the appointment of a receiver the lease was determined under a proviso contained in it, by the lessee company going into voluntary liquidation, it was held that, notwithstanding a demand for immediate

(*k*) See *Re Kearney*, 26 L. R. Ir. 89.

(*l*) *Re Rogerstone Brick and Stone Co.*, [1919] 1 Ch. 110: the prior mortgage had been created with the express assent of the debenture holders, and it was

considered that it would have been oppressive for the receiver to refuse his consent.

(*m*) *Re British Red Ash Collieries, Ltd.*, [1920] 1 Ch. 327.

Chap. VII. possession by the lessor, the receiver was entitled to a reasonable time for the sale on the premises and removal of the fixtures (*n*).

Sale. A receiver acquires no power of sale by virtue of his appointment, but in most cases the court has power to direct a sale of the property over which the receivership extends ; for instance, where the appointment is made in an action for foreclosure redemption or sale (*o*), or a partition action, or in the administration of the estate of a deceased person. Sales in debenture-holders' actions (*p*), and after an order appointing a receiver by way of equitable execution (*q*), are dealt with in other pages. The court has power under R. S. C. Ord. 50, r. 2, on the application of any party, to make an order for the sale by any persons and in any manner of any goods, wares or merchandise which may be of a perishable nature or likely to injure from keeping, or which from any other just and sufficient reason it may be desirable to have sold at once (*r*).

In cases where the court directs the sale out of court or with the approbation of the judge, the sale is often ordered to be made by the receiver, especially in cases where the whole of an undertaking is sold ; but, except in the case of the chattels which pass by delivery, the

(*n*) *Re Glasdir Copper Works*, 2 Ch. 96.
[1904] 1 Ch. 819.

(*o*) The sale can only be made subject to incumbrances of those incumbrancers not parties unless they are paid off: see Conveyancing Act, 1881, s. 25 ; but not of part of the surface apart from the rest: see *Stamford, &c., Banking Co. v. Keeble*, [1913]

(*p*) See p. 228. For a case where a sale by auction of a claim against directors was ordered, see *Wood v. Woodhouse* (1896), W. N. 4.

(*q*) See p. 213.

(*r*) See notes to this rule in Annual Practice.

assurance of the property must be executed by those persons in whom the property is vested (s). Chap. VII.

A receiver can sell the copyright of a book which had been assigned to the company, free from any author's lien for royalties, where such royalties had not, by the original assignment, been charged as an unpaid vendor's lien, but were only secured by the covenant of the company (t).

Where the receiver is appointed manager he can carry out all such sales as are necessary for the ordinary conduct of the business over which he is obtained, but no sale of the permanent plant or assets should be made without leave of the court.

A receiver, being in a fiduciary position, cannot, directly or indirectly, without the leave of the court, bid at a sale or purchase any of the property subject to the receivership, even though the sale is made by a mortgagee selling outside the action (u). Receiver may not purchase.

COMPANIES.

The powers and duties of receivers and managers appointed over the undertaking of a company do not differ in principle from those of receivers for other incumbrancers. In the ensuing pages only those points are discussed which are peculiar to receivers of the property of companies: the earlier portion of the chapter should be referred to in respect of their other powers and duties, and Chapter IX. in respect of their powers and duties as managers. Generally.

(s) As to practice on sales generally, see R. S. C. Ord. 51 ; and as to companies, Palmer, Vol. III., Chap. 70, and p. 228. marks, *Hort and Richards v. Thurber Whyland*, 32 R. P. C. 217.

(t) *Barker v. Stickney*, [1919] 1 K. B. 121. As to sale of trade (u) *Nugent v. Nugent*, [1908] 1 Ch. 546 ; *Alven v. Bond*, 1 Fl. & K. 196.

Chap. VII. In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a limited company (*x*), secured by a floating charge (*y*), or in case possession is taken by or on behalf of such debenture holders, of any property comprised in or subject to such a charge, then and in either of such cases, if the company is not at the time in course of being wound up, the debts mentioned in section 209 (*z*) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), are required by section 107 (*a*) to be paid forthwith out of any assets coming to the hands of the receiver, in priority to any claim for principal or interest in respect of such debentures or debenture stock. But any payments made under the last-mentioned section are to be recouped, as far as may be, out of the assets of the company available for payment of general creditors, subject to the costs, charges, and expenses of winding-up.

Duty of receiver of assets of a company as to preferential debts.

The effect of sub-sections 1 (*a*), 2 (*b*), and 3 of section 209, is to make the costs and expenses of winding-up payable out of the assets not included in the debenture-holder's security, in priority to the preferential debts: if such assets are insufficient for payment of preferential debts, the balance is ultimately borne by the assets subject to the debenture-holder's charge (*b*). Where money has been paid over to the debenture holders without providing for preferential debts, the proper plaintiff in an action to

(*x*) These sections do not appear to apply to public statutory companies: see s. 285.

(*y*) As to what are floating, as distinguished from specific charges, see *Nat. Provincial Bank of England v. United Electric Theatres*, [1916] 1 Ch.

132, and *ante*, p. 230.

(*z*) Replacing s. 1 of Preferential Payments in Bankruptcy Act, 1888.

(*a*) Replacing s. 3 of the Amendment Act, 1897.

(*b*) *Westminster Corporation v. Chapman*, [1916] 1 Ch. 161.

recover contribution from them is the liquidator in the name of the company (c). Chap. VII.

In all cases where a receiver is appointed in a debenture-holders' action, a direction is to be inserted in the order that the receiver do forthwith, out of any assets coming to his hands, pay the debts of the company which have priority over the claims of the debenture holders under the above Act ; and that the receiver be allowed all such payments in his accounts (d). The receiver is personally liable to creditors for disobedience (e).

A receiver appointed by debenture holders under a power contained in their debentures, who takes possession of the property charged by the debentures, takes possession "on behalf of" the debenture holders within the meaning of the above section 209, and section 107 accordingly applies to such a case (f).

The debts to which priority is given by section 209 are parochial or other local rates, taxes, wages or salary of any clerk or servant during four months prior to the appointment or winding-up order not exceeding £50, wages for two months of any labourer or workman not exceeding £25, and sums due under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), not exceeding £100 (g), in any individual case, subject to the provisions of section 5 of the last-mentioned Act (h). By section 110 of the National Insurance Act, 1911, all contributions payable thereunder by the company in respect of employed

(c) *Ib.*

W. N. 103.

(d) *Re Debenture-Holders' Actions*, [1900] W. N. 58 ; Seton, 7th ed., 235.

(g) This does not include costs : *Re Jinks*, 112 L. T. 88 ; [1914] W. N. 337.

(e) *Woods v. Winskill*, [1913] 2 Ch. 303, and *infra*, p. 284.

(h) See the provisions of s. 209 for further details as to payments which are to be made.

(f) *Re Barnby's, Limited* (1899)

K.R.

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Chap. VII. contributors for four months are added to the debts to which priority is given by section 209. Special provisions are applicable to companies within the Stan-
dards by section 240 of the Companies (Consolidation) Act, 1908.

It is not possible to give any general definition of the words "clerk or servant" (i): the existence of control by the master, the degree of independence in the person who renders services, and the place, are all matters to be considered in determining whether there is a contract of service (k). Where persons are (1) working entirely away from the company's premises; (2) not exclusively employed by the company, but at liberty to take other employment; (3) only bound to render a particular class of service, and (4) might perform the service as they pleased not under the control or subject to the command of the company, they are not within the Act; but one of these circumstances alone, except possibly (4), would not necessarily exclude them (l). Thus persons contributing articles and reports to a newspaper at a fixed salary and at fixed times, but working away from the office, were excluded (m); but a "dress editress" at a fixed salary, with a seat in the office and a general supervision over illustrations, was held to be a servant (n).

The managing director of a company is not a "clerk

(i) See *Simmons v. Heath Laundry*, [1910] 1 K. B. 543: a contract for service is not necessarily a contract of service so as to constitute a person a servant (ib.); see also *Evans v. Liverpool Corp.*, [1906] 1 K. B. 160; *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.*,

[1916] 2 Ch. p. 610; *Smith v. General Motor Cab Co.*, [1911] A. C. 188.

(k) *Re Beeton & Co., Ltd.*, [1913] 2 Ch. 279.

(l) *Re Ashley and Smith, Ltd.*, [1918] 2 Ch. 378.

(m) Ib.

(n) *Re Beeton & Co., supra.*

or servant" within the meaning of the Act (o); nor is a Chap. VII. secretary in respect of the salary of a clerk paid by him (p); but a director may be entitled to preference in respect of salary as a clerk or servant, if also employed in that capacity, and the employment is authorised by the articles (q). Debts due to the following have been held entitled to priority: workmen paid by way of commission (r); commercial travellers paid by way of commission (s); an opera singer paid a certain sum for each performance (t); a chemist employed for definite hours on three days a week to produce certain formulæ, having other employment during remainder of the week (u).

Rates which the receiver is entitled to be recouped by the liquidator, include all rates due and unpaid at the appointment, though assessed in respect of a subsequent period; but water rate must be apportioned up to the winding-up (x).

The rights and duties of a receiver for incumbrancers with regard to rent (y) and attornment of tenants (z) have already been discussed; also his right to possession (a).

A receiver for debenture holders has no right to the rents in arrear when he goes into possession of property over which the debentures constituted only a floating charge, as against specific assignees of such arrears; but the case is otherwise where the arrears of rent claimed

(o) *Re Newspaper Proprietary Syndicate*, [1900] 2 Ch. 349.

(p) *Cairney v. Back*, 22 Times Rep. 776.

(q) *Re Beeton & Co., Ltd.*, *supra*.

(r) *Re Earle's Shipbuilding Co.*, [1901] W. N. 78.

(s) *Re Klein*, 22 Times Rep. 664.

(t) *Re Winter German Opera*, 23 Times Rep. 662.

(u) *Re G. H. Morrison & Co., Ltd.*, 106 L. T. 731.

(x) *Re Mannesmann Tube Co.*, [1901] 2 Ch. 93.

(y) *Ante*, pp. 189, 268.

(z) *Ante*, pp. 238, 245.

(a) *Ante*, p. 236.

Chap. VII. by the specific assignees thereof are in respect of property specifically charged by the debentures (b).

Lease-holds.

The liability of a receiver appointed on behalf of equitable incumbrancers for the rent of leaseholds has already been dealt with (c). A receiver appointed on behalf of debenture holders is in the same position in this respect as a receiver appointed on behalf of a mortgagee by sub-demise: he is therefore under no contractual liability to pay rent under a lease to the company, though he may be in occupation (d); though he may be compelled to pay arrears to avoid distress. If he enters into a fresh agreement for tenancy or an agreement to pay arrears, he will be personally liable thereon with a right to indemnity (e).

Debtors to the company.

The receiver should at once give notice of his appointment to debtors to the company and require them to pay their debts to him, obtaining where necessary an order for that purpose (f). If an action to compel payment is necessary it must be brought in the name of the company, or if a winding-up has begun, of the liquidator, on a complete indemnity to the latter (g). The debenture holders have no absolute right to insist on, or prohibit any action being brought; the court has a discretion to be exercised for the benefit of the parties interested (h).

Uncalled capital.

Where uncalled capital is included in the debenture-holders' security, the receiver may be given leave to use the name of the liquidator on a complete indemnity to

(b) *Re Ind, Coope & Co.*, [1911] 2 Ch. 223.

(c) *Supra*, p. 264, to which reference should be made.

(d) *Re J. W. Abbott & Co.*, [1913] W. N. 284; *Hay v. Swedish, &c., Ry. Co.*, 8 Times Rep. 775.

(e) *Infra*, p. 285; as to deduction of income tax, see p. 266.

(f) *Ante*, p. 246.

(g) See as to extent of the indemnity for costs, p. 251.

(h) *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. 305, and *ante*, p. 249.

the latter, in order to recover the calls made by him (i). Chap. VII. It is necessary to apply to the court for directions to the liquidator to make the requisite calls in order to enable the debenture holders to obtain realisation (k). In such cases it is a usual and convenient practice for the liquidator to be appointed receiver (l). If the company is not in liquidation, then, if the uncalled capital is included in the security, the plaintiff should apply by summons that the receiver may be authorised to make the call and recover the amount called up, with power if necessary to sue in the company's name. As pointed out (m), the order appointing a receiver excludes uncalled capital, and therefore special directions are required as to making the call and dealing with the proceeds (n). If there is a doubt as to whether the uncalled capital is included in the security (o), it may be necessary to issue a summons to determine the point (p).

As already stated, the receiver should apply to the court for leave to exercise all powers not implied, or expressly included in, the terms of his appointment (q), which he considers necessary to preserve the property entrusted to him. Powers and duties generally.

Thus he may be given power to appoint attorneys, to give up possession to prior mortgagees, to give up property generally to prior claimants, to give up tenancies, to close

(i) *Re Westminster Syndicate*, 99 L. T. 924; forms of order, Palmer's Comp. Prec., Vol. III., pp. 714 *et seq.*

(k) *Fowler v. Broad's Patent, &c., Co.*, [1893] 1 Ch. 724: see as to Master's certificate as to unpaid calls, *Madeley v. Rose, Sleeman & Co.*, [1897] 1 Ch. 505.

(l) *Ante*, p. 152.

(m) *Ante*, p. 140.

(n) Also whether any additional security is to be given.

(o) See *Re Streatham Estates Co.*, [1897] 1 Ch. 15; *Re Handyside & Co.*, 131 L. T. Jo. 125.

(p) See *Re Gregory, Love & Co.*, [1916] 1 Ch. 203.

(q) See *ante*, pp. 247 *et seq.*

Chap. VII. businesses, to compromise claims, to grant leases, to give undertakings not to commit nuisances, to promote a bill in Parliament, to pay out certain debenture holders, to repair, to pay off prior incumbrances, to go abroad to arrange a sale of assets, and generally to exercise any power the exercise of which the court has under its statutory or general jurisdiction authority to direct or sanction (r).

Duty of receivers appointed at instance of mortgagees of a business.

It is the duty of a receiver to preserve the property entrusted to him. If, therefore, debenture holders obtain the appointment of a receiver over the actual assets of the business, apart from the goodwill, it is no part of the duty of such receiver to preserve the goodwill: he has to preserve the assets entrusted to him with a view to their most favourable realisation: he need not have regard to contracts entered into by the mortgagor (s), though it may become necessary for him to apply for certain powers of management to preserve the assets which are in his possession. Where, however, the receiver is also appointed manager, the goodwill forms part of the property entrusted to his care, and he must, in order to preserve it, carry out contracts entered into by the mortgagor, unless authorised by the court to disregard them (t).

(r) Forms of application, Dan. C. F. 918-921. Forms of order, Seton, 7th ed., p. 762; Palmer's Comp. Prec., Pt. III., pp. 701 *et seq.*, 724 *et seq.*, 755 *et seq.*;

as to statutory companies, see p. 307.

(s) See *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468.

(t) *Ib.*, and see Chap. IX.

CHAPTER VIII.

LIABILITIES OF A RECEIVER.

A RECEIVER is liable to account for all money coming into his hands, in his capacity of receiver, at any time, whether before or after the date of perfecting his security. The principle, that the appointment is merely conditional until his security is perfected, has no application where the question is as to his own liability, or that of his sureties, in respect of money received or expended by him (a).

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A receiver is responsible for any loss occasioned to the estate over which he is appointed by reason of his wilful default (b). If he places money received by him in what he knows to be improper hands, he will have to answer the loss out of his own pocket (c). A receiver, however, is not expected, any more than a trustee or executor, to take more care of property entrusted to him than he would of his own (d). If he deposits money for safe custody with a banker in good credit, to be placed to his account as receiver, he will not be answerable for the failure of the banker (e). The money must, however, be deposited to the account of the receiver in that character, or be otherwise earmarked. If a receiver pays money which comes into his hands as receiver to his private

Responsi-
bility for
losses.

(a) *Smart v. Flood*, 49 L. T. N. S. 467.

(b) *Skerrett's Minor*, 2 Hog. 192.

(c) *Knight v. Lord Plymouth*, 3 Atk. 480.

(d) 1 J. & W. 247, per Lord Eldon. Comp. *White v. Baugh*, 9 Bligh, 198.

(e) *Knight v. Lord Plymouth*, 3 Atk. 480.

Chap. VIII. account with a banker, and not to a separate account as receiver, or otherwise mixes up the money which he collects as receiver with his own money, he will be liable for the loss if the banker fails (*f*).

Parting with control of fund. If a receiver puts a fund out of his own control so that other persons are able to deal with it, he guarantees the solvency of those persons, and becomes answerable for any loss that may ensue. It is immaterial that he may not have so far parted with the control as to enable another person to deal with it without his concurrence, if he has parted with his exclusive control, by associating with himself the authority of another person (*g*). A receiver, in whom the court confides, is not entitled to mix up with his delegated authority another person who is a total stranger to the court (*h*). Accordingly, in a case where the receiver, in order to obtain sureties, had agreed that the money to be collected from the property over which he was receiver should be handed over to a person who was the partner of one of the sureties, and should be deposited with bankers in the joint names of the sureties, and that all drafts upon the money so deposited should be written by the partner and signed by the receiver, it was held that the receiver was liable for the loss occasioned by the failure of the banking-house in which the money had been deposited (*i*). If, indeed, a receiver parts with his control over the fund, by introducing the control of an irresponsible person who is unknown to the court, it is conceived that he will be answerable for any loss which may happen to the

(*f*) *Wren v. Kirton*, 11 Ves.

(*h*) *Ib.* 219.

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(*i*) *Ib.*; *S.C.* in *H. L. nom.*

(*g*) *Salway v. Salway*, 2 R. & M. 214.

White v. Baugh, 9 Bligh, 181; 3 Cl. & Fin. 44.

fund which he has so dealt with, not only where some particular peril in which he has placed the fund can be shown to have been the cause of the loss, but generally where he has not conducted himself as a prudent person would have done (*k*).

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In a case where a receiver had paid money to the plaintiff's solicitor, with directions to pay it into court, which had not been done, the receiver was held liable for the loss, there being no sufficient evidence to show that the receiver had authority from the plaintiff to pay the money to the solicitor (*l*). And where a receiver appointed by way of equitable execution pays money to the judgment creditor's solicitor instead of to the creditor himself, he will be liable if the money never comes to the creditor's hands (*m*).

A sum of money due from a receiver, whether the amount has been ascertained or not, is, if and so long as a recognisance exists, a debt of record (*n*).

If a receiver is in default for not passing his accounts and paying his balances within the proper time, or if, not being in default, he derives a benefit by accepting interest on the balances which are from time to time in the hands of his banker, he is liable to make good any loss which may be occasioned by the bankruptcy of the banker, although the moneys may have been deposited to a separate account (*o*).

(*k*) *Salway v. Salway*, 2 R. & M. 220.

(*l*) *Delfosse v. Crawshaw*, 4 L. J. Ch. N. S. 32; see, too, *Dixon v. Wilkinson*, 4 Drew. 614; 4 D. & J. 508.

(*m*) *Ind, Coope & Co. v. Kidd*, 63 L. J. Q. B. 726.

(*n*) *Seagram v. Tuck*, 18 Ch. D. 296.

(*o*) *Drever v. Maudsley*, 13 L. J. 433; 8 Jur. 547; 3 L. T. 157; see, too, *Shaw v. Rhodes*, 2 Russ. 539; *Wilkinson v. Bewick*, 4 Jur. N. S. 1010.

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A person who, having improperly assumed the character, neglects the duties of a receiver, while the parties interested consider him to be acting as receiver, makes himself responsible for any property which is lost through his neglect (*p*). If a solicitor in an action assumes the character of a receiver, and rents are paid to him in that character, he will be ordered to pay them over to the real receiver, and can claim no lien upon them, either by virtue of an agreement with a party to the action or for costs (*q*).

If a receiver has paid money to a wrong person, and is afterwards obliged to pay the amount into court, and after due application thereof a surplus remains, the court will not pay over such surplus to the person to whom the former payment was wrongfully made without satisfying the receiver's demands (*r*). If, however, the wrongful payment is made by the receiver's agent, the receiver cannot have the benefit of the payment against the surplus, except subject to any liability of the agent to the person to whom the wrongful payment was made; and the accounts cannot be opened between those persons on application by the executor of the receiver, praying for repayment from the person wrongfully paid, or, in default of such repayment, out of the rents of the estate over which the receiver was appointed (*s*).

Where a receiver appointed by debenture holders had paid into court, to a separate account in his name, money received under a contract, it was held that he came within the category of agents who have handed over

(*p*) *Wood v. Wood*, 4 Russ. 558.

(*q*) *Wickens v. Townsend*, 1 R. & M. 361.

(*r*) *Gurden v. Badcock*, 6 Beav. 162.

(*s*) *Ib.* 157.

money to their principals and that he was therefore not liable to judgment for breach of contract (t). Chap. VIII.

A receiver appointed over an estate by a colonial court is liable to be sued by the persons to whom the produce of the estate has been directed to be paid for an account of that produce; and the consignees of the produce, to whom express directions have been given for its application, are also liable to be sued, on the allegation that they are colluding with the receiver for the purpose of satisfying the claim against him out of money in their hands received from the estate and due to the plaintiff (u).

In one case, upon motion on behalf of a late ward of court, charging that certain accounts formerly passed were such as ought not to bind the applicant and stating errors and neglect, the receiver was ordered to account again from the beginning (x).

A receiver may be ordered personally to pay costs incurred by reason of his misconduct or neglect in the discharge of his duties (y). He will not, however, be held personally responsible if he has honestly done his best and failed. If a receiver has not succeeded in getting in rents, it is his first duty to lay the state of affairs before the court, and to ask for guidance, under circumstances where the incumbrancers on the property can consult and advise with him as to the best course to be pursued for their common interests (z). Receiver when ordered to pay costs.

A receiver is personally liable for breach of a statutory Breach of statutory duty.

- (t) *Bissell v. Ariel Motors*, Moll. 545.
Ltd., 27 T. L. R. 73. (y) *Ex parte Brown*, 36 W. R.
 (u) *Fitzgerald v. Stewart*, 2 303.
 Sim. 333. (z) *Re St. George's Estate*, 19
 (x) *Wildridge v. M'Kane*, 2 L. R. Ir. 566.

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duty ; *e.g.*, if with notice of a preferential claim he exhausts the assets in making payments to other creditors he is liable for damages in tort to the preferential creditor (a) : it would be difficult, if not impossible, for a receiver successfully to allege want of notice in such a case, as it would be implied from the circumstances (b).

Attach-
ment of
receiver
under the
Debtors
Act.

A person who owes money, come to his hands as receiver, is in a fiduciary capacity within the meaning of the third exception to section 4 of the Debtors Act, 1869. He is liable to attachment for breach of an order to pay such money, made after he has been discharged from being receiver. The mere fact that a defaulting receiver is unable to pay is not sufficient to induce the court to exercise the discretion given by the Debtors Act, 1869, Amendment Act, 1878, and to refuse leave to issue an attachment (c).

Liabilities
of receiver
to third
parties for
miscon-
duct in
the
exercise of
his duties.

Although the court will not allow the possession of its receiver to be disturbed without its leave (d), it will in its discretion, if the misconduct of the receiver becomes the subject of proceedings in another court, either itself take cognisance of the complaint, or leave the matter to be dealt with in the other proceedings. There is a clear and well-recognised distinction between cases where the jurisdiction of the court, or the validity or propriety of its orders or process, is disputed, and cases where the authority of the court is admitted, but redress is sought against its officer for irregularity or excess in the performance of its orders. In the former case the court has no choice, but must draw the whole matter over to its

(a) *Woods v. Winskill*, [1913] 2 Ch. 303 ; and cf. *Argylls, Ltd. v. Coxeter*, 29 Times Rep. 355.

(b) *Westminster Corp. v. Chap-*

man, [1916] 1 Ch. 169 ; see, further, p. 272, *ante*.

(c) *Re Gent*, 40 Ch. D. 190.

(d) *Supra*, p. 192.

own cognisance. In the latter case, the court has an indisputable right to assume the exclusive jurisdiction ; but it may, if it thinks fit, on the circumstances being specially brought before it, permit another court to proceed for punishment or redress (e). Chap. VIII

As a receiver is in a fiduciary capacity and therefore cannot, without the special leave of the court, purchase either directly, or indirectly in the name of a trustee for himself, any property or interest in property over which he is receiver (f), he must account for any profit made by him through a purchase or other dealing (g). A receiver is a trustee for the parties interested of any money due from him as receiver and not accounted for by him, and he could not, as against them, avail himself of any Statute of Limitations, even when his final accounts have been passed and the recognisance vacated (h). In *Re Cornish* (i) Kay, L.J., expressed the opinion that a receiver was not within the protection of section 8 of the Trustee Act, 1888 (k).

A receiver appointed by the court is an officer of the court : he is therefore not an agent for any person, but a principal, and as such personally liable to all persons contracting with him, unless his personal liability is

Personal liability and right to indemnity of receivers.

(e) *Aston v. Heron*, 2 M. & K. 396 ; see, too, *Chalie v. Pickering*, 1 Keen, 749.

(f) *Ante*, p. 255.

(g) See *Nugent v. Nugent*, [1908] 1 Ch. 546 ; and nn. to *Fox v. Mackneth*, 2 White & Tudor Cases in Equity.

(h) *Seagram v. Tuck*, 18 Ch. D. 296.

(i) [1896] 1 Q. B. p. 104.

(k) The actual decision was that the Act did not apply to a trustee in bankruptcy. The observations of Lord Esher on s. 8 appear at variance with those of Lord Sterndale and Warrington, L.J., in *Re Richardson*, [1920] 1 Ch. pp. 438, 447. See, however, judgment of Younger, L.J., at p. 449.

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excluded by the express terms of the contract, subject to a correlative right to be indemnified out of the assets in respect of all liabilities properly incurred (*l*). He is entitled to this indemnity in priority even to the claims of persons who have advanced money under an order making the repayment of the advance a first charge on all the assets (*m*), and in priority to the costs of the action (*n*), and subject only to the plaintiff's costs of realisation (*o*). Questions as to a receiver's liability and right to indemnity occur most frequently where he is also appointed manager and are dealt with fully in Chapter IX.

A receiver appointed by the court at the instance of debenture holders or mortgagees of a company is personally liable as a principal in respect of contracts or engagements entered into by him, but he is not personally liable in respect of breaches of contracts which were entered into by the company before his appointment (*p*).

The owner made liable by section 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), does not include a constructive owner such as a receiver (*q*), and the person liable under section 72

(*l*) *Burt, Boulton and Hayward v. Bull*, [1895] 1 Q. B. 276; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Re A. Boynton, Ltd.*, [1910] 1 Ch. 519; *Moss Steamship Co. v. Whinney*, per Lord Mersey, [1912] A. C. p. 271; and see *Ex parte Izard*, 23 Ch. D. 75, 79; *Re Brooke*, [1894] 2 Ch. 600.

(*m*) *Strapp v. Ball, Sons & Co.*, [1895] 2 Ch. 1; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Re A. Boynton, Ltd.*, [1910] 1 Ch.

519.

(*n*) *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317.

(*o*) See *Re London United Breweries*, [1907] 2 Ch. 511; and *Ramsay v. Simpson*, [1899] 1 Ir. R. 194.

(*p*) See Chap. IX. as to liability for rent; see p. 264.

(*q*) *Metropolitan Water Board v. Brooks*, [1911] 1 K. B. pp. 292, 293. As to liability in respect of gas, electric light, rates, &c., ante, pp. 226, 272.

of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), is the person who actually collects the rents; consequently, where a mortgagor had appointed a collector who paid them first to the mortgagor and afterwards to a receiver, the collector and not the receiver was held liable to pay the water rate (r). Chap.
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(r) *Metropolitan Water Board v. Brooks*, [1911] 1 K. B. 289.

CHAPTER IX.

MANAGERS AND CONSIGNEES.

Chap. IX. WHERE a receiver is required for the purpose not only
Manager. of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade, business, or undertaking, he is called a manager, or more usually a receiver and manager. The appointment of a manager implies that he has power to deal with the property over which he is appointed manager and to appropriate the proceeds in a proper manner (a).

In what cases appointed. Where the court appoints a manager of a business or undertaking, it in effect takes the management of it into its own hands; for the manager is the servant and officer of the court, and upon any question arising as to the character or details of the management, it is for the court to direct and decide. Managers, when appointed by the court, are responsible to the court, and no orders of any of the parties interested in the business of which they are appointed managers can interfere with this responsibility. The court will not assume the management of a business or undertaking, except with a view to the winding-up and sale of it. The management is an interim management: its necessity and its justification spring out of the jurisdiction to liquidate and sell: the business or undertaking is managed and continued in

(a) *Sheppard v. Oxenford*, 1 18 Ch. D. 547; *Parsons v. K. & J.* 500; *Re Manchester and Milford Railway Co.*, 14 Ch. D. *Sovereign Bank of Canada*, [1913] A. C. 160.
648, 653; *Truman v. Redgrave*,

order that it may be sold as a going concern, and with Chap. IX. the sale the management ends (b). The court will, however, appoint a person to manage the business of a testator pursuant to the trusts of his will, although no sale or winding-up is contemplated, for instance, where the legatee of the business is an infant (c).

The court has also jurisdiction, upon interlocutory application, to authorise a receiver to exercise such powers of management as are necessary for the preservation of property, which is the subject of litigation, and to which the applicant has made out a *prima facie* title (d). Thus, where the application was made by a lessor in an action to recover possession of a licensed hotel, the lease of which contained covenants by the lessee to keep the premises continuously open as an hotel and not to endanger the licences, the court, being satisfied that the licences were in jeopardy owing to threats by the defendant lessee to close the hotel, appointed a receiver, directed the licences to be handed over to him, and authorised him to keep the premises open as an hotel, and to do all acts necessary to preserve the licences (e). In such cases the receiver is not given general powers of management, but such powers only as are necessary to preserve the property.

(b) *Gardner v. L. C. & D. Ry. Co.*, L. R. 2 Ch. App. 211, 212, per Lord Cairns; *Whitley v. Challis*, [1892] 1 Ch. p. 69; *Re Newdigate Colliery Co.*, [1912] 1 Ch. p. 472. In *Peek v. Transmaran Iron Co.*, 2 Ch. D. 115, foreclosure only seems to have been asked for, but the court has power to order a sale in such a case.

(c) See *Re Irish*, 40 Ch. D. 49.

(d) *Leney & Sons, Ltd. v. Callingham*, [1908] 1 K. B. 79; see especially judgment of Farwell, L.J.; *Charrington v. Camp*, [1902] 1 Ch. 386; and see R. S. C. Ord. 50, r. 3.

(e) *Leney & Sons, Ltd. v. Callingham*, *supra*, q.v. as to form of order.

Chap. IX. A manager may be appointed to carry on a private trade or business with a view to effecting a sale or winding-up for the benefit of the persons interested. Thus, a manager was appointed to carry on the business of an intestate, there being no existing representative of his estate (*f*). Where trustees have to manage a business, but are not themselves qualified to do so, and cannot agree in appointing a manager, the court will appoint a receiver and manager of the business (*g*).

Partnership.

The court has jurisdiction to appoint a manager of a partnership business, with a view to winding it up or selling it as a going concern (*h*), and notwithstanding that the partnership has expired pursuant to a provision contained in the partnership deed (*i*). The appointment is made for the purpose of preserving the assets and nothing more: the court does not intend to throw any liabilities of an onerous nature upon the partners (*k*).

Lunacy.

The court in Lunacy may authorise the committee or receiver of the estate of a lunatic to carry on the trade or business of the lunatic (*l*). The person so authorised is, for the purpose of estimating his liability to persons dealing with him, the agent of the lunatic (*m*).

Bankruptcy.

By section 10 of the Bankruptcy Act, 1914, the official

- (*f*) *Steer v. Steer*, 2 Dr. & Sm. 311; see also *Blackett v. Blackett*, 19 W. R. 559; *Spencer v. Shaw* (1875), W. N. 115; *Re Wright*, 32 S. J. 721; as to manager of a newspaper, see *Chaplin v. Young*, 6 L. T. 97.
 (*g*) *Hart v. Denham* (1871), W. N. 2, per Lord Romilly, M.R.
 (*h*) See also pp. 90, 104, *ante*.
 (*i*) *Taylor v. Neate*, 39 Ch. D. 538.
 (*k*) Per Chitty, J., in *Taylor v. Neate*, 39 Ch. D. at p. 545. See also *Boehm v. Goodall*, [1911] 1 Ch. 155.
 (*l*) Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 120; and Lunacy Act, 1908, s. 1.
 (*m*) *Plumpton v. Burkinshaw*, [1908] 2 K. B. 572.

receiver, while acting as interim receiver of the debtor's estate, may, on the application of any creditor, appoint a special manager to act until a trustee is appointed (*n*). This section enables the official receiver to appoint a special manager while acting as interim receiver under section 8, prior to a receiving order (*o*). Even if the petition is dismissed the special manager is entitled to be paid his expenses properly incurred and his remuneration out of his receipts; the debtor cannot impugn any acts done by the manager in the proper conduct of the business (*p*).

The court will appoint a manager upon the application of incumbrancers whose security includes the goodwill (*r*); but unless the goodwill is included a receiver only will be appointed (*s*); though he may it seems be given such powers of management as are necessary to preserve the property actually comprised in the security (*t*). An incumbrancer with a charge upon the goodwill has an option either to have a receiver simply or a receiver or manager: if he elects for a receiver only the goodwill is destroyed (*u*).

(*n*) As to practice, see Bankruptcy Rules 318, 351–353. The official receiver has absolute discretion as to whether or not he will make the appointment and no appeal lies: *Re Whitaker*, 1 Mor. 36.

(*o*) See s. 74 as to powers of interim receiver after receiving order.

(*p*) *Re A. B. & Co.* (No. 2), [1900] 2 Q. B. 429; *Re A Bankruptcy Petition*, 7 Mans. 132. Accounts may be enforced under

s. 105 (5); see *Re Jones*, [1908] 1 K. B. 204.

(*q*) As to managers appointed under powers of an instrument, see Chap. XIV.

(*r*) *Truman v. Redgrave*, 18 Ch. D. 547.

(*s*) *Whitley v. Challis*, [1892] 1 Ch. 64; *Re Leas Hotel*, [1902] 1 Ch. 332.

(*t*) Upon the principles illustrated in *Leney & Sons, Ltd. v. Callingham*, [1908] 1 K. B. 79.

(*u*) See p. 80, *ante*.

Chap. IX. The legal mortgagees of an hotel, whose security comprised the trade fixtures, goodwill and business, obtained upon interlocutory motion the appointment of a manager of the business of a licensed victualler carried on in it (*v*). So a manager has been appointed at the instance of holders of a registered statutory mortgage of a steamship (*x*); of collieries held under a lease containing working covenants (*y*); and on the application of the unpaid vendor of the property of a company in liquidation (*z*). In order that the goodwill may be included in the security it need not be expressly mentioned: thus, where debentures issued by an hotel company charged "all its property and effects whatsoever," it was held that the goodwill of the business was included under the expression "property" and a manager was appointed on the application of the plaintiff in a debenture-holders' action (*a*).

Com-
panies,

The appointment of a manager is very frequently made over the undertaking of an ordinary limited company, on the application of mortgagees or debenture holders whose security includes the goodwill (*b*). Formerly

(*v*) *Truman v. Redgrave*, 18 Ch. D. 547; see this case for form of order. See also *Ind, Coope & Co. v. Mee* (1895), W. N. 8.

(*x*) *Fairfield, &c., Co. v. London and East Coast S.S. Co.*, (1895), W. N. 64.

(*y*) *Campbell v. Lloyd's Bank*, 58 L. J. Ch. 424; *County of Gloucester Bank v. Rudry Coal Co.*, [1895] 1 Ch. 629.

(*z*) *Boyle v. Bethws Llantwit Co.*, 2 Ch. D. 726.

(*a*) *Re Leas Hotel Co.*, [1902] 1 Ch. 332; but *semble* that a mortgage of land and buildings on which experimental works were carried on would not authorise the appointment of a manager to carry on similar works as a commercial enterprise: *Stamford, &c., Banking Co. v. Keeble*, [1913] 2 Ch. p. 102.

(*b*) See *Re Leas Hotel Co.*, [1902] 1 Ch. 332, 334, and *ante*, p. 80.

the court felt considerable hesitation about appointing a manager of the business of a limited company (c), but it is now well settled that the court will readily make the appointment in order to enable a beneficial realisation of the property comprised in the security to be effected (d): for the appointment of a receiver only, without powers of management, must inevitably cause the destruction of the goodwill, which cannot therefore be preserved for the benefit of the persons who have a charge upon it unless a manager is appointed; but a manager cannot be appointed of a statutory company for the conduct of a public undertaking (e). Where three sets of debentures had been issued, each of which created a charge on certain specific items in addition to a general floating charge, the court appointed a receiver in each of three actions brought by the different sets of debenture holders, and appointed the receiver for the first debenture-holders manager (f).

A manager is appointed for a definite period, usually of from one to six months; if a realisation is not likely to be effected at the expiration of that period, application must be made to the court before such expiration to continue the appointment. Practice on appointment.

A manager must obey strictly the terms of his appointment: he will be disallowed items of expenditure incurred subsequent to the date up to which he was appointed as well as remuneration for services after that date (g).

(c) *Makins v. Peter Ibbotson & Co.*, [1891] 1 Ch. 133.

For form of order see Seton, 7th ed., p. 735.

(d) See *Edwards v. Rolling Stock Syndicate*, [1893] 1 Ch. 574; *Re Victoria Steamboats*, [1897] 1 Ch. 158; *Re Leas Hotel Co.*, [1902] 1 Ch. 332.

(e) See p. 306.

(f) See *Re Ind, Coope & Co.*, [1911] 2 Ch. 223.

(g) *Re Wood Green and Hornsey Laundry, Ltd.*, [1918] 1 Ch. 423.

Chap. IX. Where the official receiver becomes the liquidator of a company whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributories generally require the appointment of a special manager, other than himself, apply to the court to, and the court may on such application, appoint a special manager thereof, to act during such time as the court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the court (h).

Power to
appoint
special
manager
in wind-
ing-up
cases.

The preceding chapters of this book relative to the practice on the appointment of receivers and to its consequences are equally applicable where the receiver is appointed manager, with the exceptions mentioned below. The topics dealt with in the earlier chapters are therefore treated here so far as they apply to managers exclusively.

Effect of
appoint-
ment of
manager.

The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but the company is entirely superseded in the conduct of its business, and deprived of all power to enter into contracts in relation to that business, or to sell, pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in this respect are entirely in abeyance so far as the company is concerned, and are exercised by the receiver under the direction of the court (i).

(h) Companies (Consolidation) Act, 1908, s. 161 (1).

(i) *Per* Lord Atkinson in *Moss S.S. Co. v. Whinney*, [1912]

The receiver and manager is the agent neither of the company nor the debenture holders, but owes duties to both. He is appointed to preserve the goodwill of the business and therefore, subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment (*k*). Such contracts, unless they are contracts of employment (*l*), remain valid and subsisting notwithstanding the appointment of a receiver and manager. Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. In this respect a manager differs from a receiver appointed over the assets without any power to carry on the business, who is under no obligation and has no power to carry out these contracts or to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts (*m*). A manager must not, without leave of the court, disregard contracts in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages, nor pick and choose which contracts he will carry out as being most profitable (*n*). If, however, it can be shown that to fulfil the contracts will benefit neither the company nor the debenture holders, as, for instance, where to disregard them does not affect the value of the goodwill, the court will, on the application of the receiver, allow him to refrain

Chap. IX.
Duty of
manager
in respect
to con-
tracts
entered
into before
his ap-
point-
ment.

A. C. p. 263; *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160. (*l*) These are discussed, *ante*, p. 234.

(*m*) See *ante*, p. 80.

(*k*) See *Re Newdigate Colliery Co.*, *infra*; *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160. (*n*) *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468; *Moss S.S. Co. v. Whinney*, [1912] A. C. p. 262.

Chap. IX. from carrying them into effect (o). The same principles apply to managers of a private business appointed at the instance of mortgagees.

The above principles were illustrated in a case in which the Court of Appeal refused to allow the manager appointed over the undertaking and assets of a colliery company to disregard contracts which had been entered into for the forward supply of coal, although, owing to a rise in price, this course would have enabled the manager to obtain enhanced receipts to the extent of £200 a week (p). In another case a company had contracted to construct for £60,000 certain ships which were unfinished at the date of the appointment of the receiver and manager, and in respect of which £20,000, part of the purchase price, had then been paid on account: the company had given to a bank a charge, which ranked in priority to the debentures, to secure £40,000 on the ships and the unpaid balance of £40,000 to be received under the contract; it was proved that the cost of completing the ships would amount, without profit, to £50,000. In these circumstances, the court refused to sanction a borrowing by the receiver and manager for the purpose of completing the ships, and authorised him

(o) *Re Thames Ironworks*, [1912] W. N. 66; 106 L. T. 674; *Re Great Cobar, Ltd.*, [1915] 1 Ch. 682. In the latter case it appears to have been considered that the fact that to disregard the contract might have involved a heavy claim for damages was immaterial: see, however, judgment of Buckley, L.J., *Re Newdigate Colliery, Ltd.*,

[1912] 1 Ch. 478. If the debenture holders will not be substantially prejudiced, it would seem that the liability in damages would be an important factor, if there is likely to be a surplus after satisfying the debenture holders.

(p) *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468.

to discontinue work upon them, on the ground that no Chap. IX.
benefit would accrue either to the company or the debenture holders from the completion of the contract, and that in the circumstances it was not shown that the goodwill would be injured (q).

Inasmuch as a manager is considered to be carrying out contracts entered into by the company, if he continues to supply goods for which contracts had been entered into by the company before his appointment, the persons to whom they are supplied can, in an action by the receiver or by assignees for the price, set off damages for subsequent breach of such contracts by the manager ceasing to carry them out (r); and unless the receiver and manager has obtained leave to disregard such contracts he will be presumed to have acted thereunder, not on new contracts made by him (s). Effect of appointment on contracts of service.

Persons contracting with a receiver and manager, who is carrying on the business of a company, and are cognisant of his appointment, must be taken to know that he is contracting as principal, not as agent, for the company, whose powers are paralysed; consequently they could not, under a bill of lading under which goods were expressed to be consigned to the company, and which contained a provision that they were to have a lien on the goods shipped for previously unsatisfied freight due from the shippers or consignees, claim a lien on the goods against the receiver (t).

(q) *Re Thames Ironworks, Forster v. Nixon's Navigation Co., Ltd.*, 23 T. L. R. 138.

[1912] W. N. 66; 106 L. T. 674: money had been borrowed to complete other contracts. (s) *Parsons v. Sovereign Bank of Canada, supra.*

(r) *Parsons v. Sovereign Bank of Canada*, [1913] A. C. 160; (t) *Moss S.S. Co. v. Whinney*, [1912] A. C. 254. The decision

Chap. IX. A receiver and manager should, subject to any special directions of the court, carry on the business according to the general course adopted by the particular trade; he must not speculate (*u*); and if he requires to do anything outside the ordinary course of business he must obtain the leave of the court (*x*). He cannot as a general rule create any charge or lien without the consent of the court on the property of the company for debts due from it, though it would appear that he could create a lien for unsatisfied freight or traffic charges due from him personally, where such a lien is in the ordinary course of business (*y*). But if a receiver for a company purports to create a lien for unsatisfied freight due from the company it appears that he could not himself claim the goods without satisfying the lien, though the company, or the debenture holders, might do so (*z*).

Liability of managers. Receivers and managers appointed by the court (except the so-called receivers appointed in lunacy (*a*)) are personally liable to persons dealing with them in respect of liabilities incurred, or contracts entered into by them in carrying on the business, unless the express terms of the contract exclude, as they may do, any personal liability (*b*). Receivers have a correlative right to be indemnified out of the assets in respect of such payments as they have made in discharge of liabilities properly

really turned on the construction of the documents (see *Parsons v. Sovereign Bank of Canada*, [1913] A. C. p. 167).

(*u*) *Taylor v. Neate*, 39 Ch. D. 544; and see *Re British Power Co.*, [1907] 1 Ch. 528.

(*x*) See *ante*, p. 247, as to

mode of application.

(*y*) *Moss S.S. Co. v. Whinney*, *supra*.

(*z*) *Ib.*, *per* Lords Loreburn, Shaw, and Mersey.

(*a*) *Ante*, pp. 106, 290.

(*b*) *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1.

incurred (c) ; for they are not agents for any person but principals (d), and are therefore assumed to pledge their personal credit. Their liability will not be displaced by the fact that in giving orders they sign as " receiver and manager " (e). Chap. IX.

This principle, however, does not operate to render the receiver and manager personally liable in respect of sums which have been advanced pursuant to an order of the court (f), making repayment of such sums a charge on the assets (g), whether such sums are advanced by a party to the action or a stranger (h), nor for breach of contracts entered into by the company (i).

If the terms of the contract exclude the personal liability of the receiver, and limit the creditor's right to a claim against the assets (k), then, if the contract is *ultra vires*, the receiver, the creditor, can have no claim by subrogation against the assets (l), though it is presumed he could follow

(c) *Burt, Boulton and Hayward v. Bull*, [1895] 1 Q. B. 276 ; *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1 ; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365 ; *Moss S.S. Co. v. Whinney*, [1912] A. C. pp. 259, 270, 271. This principle would apply to render them personally liable under the Workmen's Compensation Act, 1906, at all events unless the employment was under a contract, breach of which by the appointment had been waived.

(d) *Re Glasdir Copper Mines*, [1906] 1 Ch. p. 378 ; *Moss S.S. Co. v. Whinney*, [1912] A. C. 254.

(e) *Burt, Boulton and Hayward v. Bull*, [1895] 1 Q. B.

276 ; see *Moss S.S. Co. v. Whinney*, *supra*.

(f) As to time and mode of enforcing the liability, see *Re Ernest Hawkins*, 31 Times Rep. 237.

(g) *Re A. Boynton, Ltd.*, [1910] 1 Ch. 519.

(h) *Re Glasdir Copper Mines*, [1906] 1 Ch. p. 384 ; *Re A. Boynton, Ltd.*, [1910] 1 Ch. 519.

(i) *Supra*, p. 297.

(k) See *Re British Power, &c., Co.*, [1907] 1 Ch. 528.

(l) Unless the contract were a beneficial one of which the debenture holders had obtained the benefit : see *Re British Power Co.*, [1907] 1 Ch. 528.

Chap. IX. money which he could earmark (*m*). If the receiver falsely represented that he had authority to contract, it is conceived that the creditor might claim damages against him personally (*n*).

Where a committee or receiver in lunacy is by an order made in lunacy authorised to manage the business of the lunatic, he is not personally liable to creditors in respect of liabilities which he has incurred in carrying on the business, unless he expressly or impliedly pledges his own credit, for he is regarded as agent for the lunatic (*o*).

Similarly, receivers and managers appointed by debenture holders or mortgagees under the powers of an instrument are not personally liable to persons dealing with them with knowledge of their position; for they are agents for the mortgagor or mortgagee according to circumstances (*p*).

Right to
indemnity.

A receiver and manager is entitled to be indemnified out of the assets against all liabilities properly incurred (*q*) by him in carrying on the business (*r*); he is entitled to this indemnity (in addition to the rest of his costs, charges, expenses, and remuneration) in priority to all other claims against the assets (except the plaintiff's costs of

(*m*) See *Sinclair v. Brougham*, [1914] A. C. 398.

(*n*) Or possibly it might be held that the exclusion of the receiver's primary liability was conditional on the existence of the right of the creditors by subrogation against the assets; this would, however, depend on the terms of the contract.

(*o*) *Plumpton v. Burkinshaw*, [1908] 2 K. B. 572

(*p*) See *post*, p. 377, where this topic is further discussed.

(*q*) See *Re British Power, &c., Co.*, [1906] 1 Ch. 497; *ib.* (No. 2), [1907] 1 Ch. 528.

(*r*) *Ex parte Izard*, 23 Ch. D. 75, 79; *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Moss S.S. Co. v. Whinney*, [1912] A. C. p. 270; and see *Re Brooke*, [1894] 2 Ch. 600.

realisation (s)), even to the claims of persons who have advanced money to enable the business to be carried on, under an order of the court declaring the repayment of such advances a first charge on the assets (t), and in priority to the costs of the action (u). The receiver may waive his rights in this respect, but waiver will not be implied except in a plain case (x), nor does bankruptcy affect his rights (y).

Even where a receiver and manager has borrowed the whole of a specified sum which he has been authorised to raise for the general purposes of the business upon the security of a charge on the assets, he will be allowed an indemnity in respect of such further liabilities as he can, in the circumstances, justify as having been properly incurred. It is not, however, enough to show that the additional liabilities were incurred in the ordinary course of business, for it is *primâ facie* the duty of the receiver and manager to obtain the leave of the court before incurring liabilities in excess of the sum specified; thus a receiver and manager of a motor car business, who had exercised to the full extent a power given to him of borrowing a specified sum, was allowed indemnity in respect of the cost of supplying bodies of cars which had been ordered, and of the rent of business premises,

(s) See *Re London United Breweries*, [1907] 2 Ch. 511.

(t) *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1; *Lathom v. Greenwich Ferry*, 72 L. T. 790; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Re A. Boynton*, [1910] 1 Ch. 519. The order ought, however, to state whether the charge is to be subject to the

receiver's right of indemnity or not; see *Re Glasdir Copper Mines*, *supra*.

(u) *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317; *Re London United Breweries*, [1907] 2 Ch. 511.

(x) See *Re Glasdir Copper Mines*, [1906] 1 Ch. 365.

(y) *Infra*, p. 301.

Chap. IX. but not in respect of the cost of cars for exhibition at a show, for this was a speculation ; nor of an overdraft for sums employed in carrying on the business, because leave to incur this liability might and should have been obtained from the court (z).

This extent of this right to indemnity is limited to the amount of the assets ; a receiver and manager of a partnership business who had made payments in excess of the assets was not allowed to claim indemnity from the partners in respect of such excess, although he had been appointed under a consent order (a).

Right of
creditors
of receiver
who
makes
default.

Where a receiver and manager has properly incurred liabilities in the discharge of his duties, his creditors, in the event of his failure to pay them, are entitled by subrogation to claim against the estate direct (b), and can resort to funds carried to the separate account of a legatee of the testator in the administration of whose estate the order appointing a receiver was made (c). If the receiver and manager has become bankrupt, payment will be ordered direct to the creditors, not through the receiver's trustee in bankruptcy (d). The creditors of a receiver and manager appointed by the court to carry on a business authorised by a testator's will to be carried are entitled by subrogation to be paid out of the assets in priority to the trustees or their creditors (e).

(z) *Re British Power, &c.*,
Co. (No. 2), [1907] 1 Ch. 528.

(c) *O'Neill v. M'Grorty*, [1915]
1 Ir. R. 1.

(a) *Boehm v. Goodall*, [1911]
1 Ch. 155.

(d) *Re London United
Breweries*, [1907] 2 Ch. 511.

(b) *Re British Power, &c.*,
Co., [1906] 1 Ch. 497 ; and ib.
(No. 2), [1907] 1 Ch. 528 ; *Re
London United Breweries*, [1907]
2 Ch. 511.

(e) See *Re Healy*, [1918] 1 Ir.
366 ; *Re Oxley*, [1914] 1 Ch.
604 ; also *Burke v. Whelan*,
[1920] 1 Ir. R. 200.

This right of the creditors to claim against the assets Chap. IX. is limited to the amount of the receiver's indemnity; thus where a receiver and manager had properly incurred liabilities to trade creditors to the extent of £900 in respect of which he was entitled to indemnity, but which remained unpaid, and was in default to the estate to the extent of £400, it was held that the creditors could only claim against the assets to the extent of the receiver's net indemnity, i.e., £500; and that, therefore, as the estate would suffer no loss by the receiver's default, his sureties could not be compelled by the creditors to make good the £400 by which he was in default; the creditors therefore had no remedy, except their claim against the receiver personally, in respect of the £400 (f). In an earlier case (g) the facts were somewhat similar, except that the sureties had paid into court the sum by which the receiver and manager was in default without contesting their liability; the court accordingly directed payment to be made direct to the creditors of the receiver and manager, who had become bankrupt, of full amount of their debts; the learned judge expressed the opinion that as the receiver was an officer of the court, the court would see that the debts of creditors to whom he had become indebted, in the course of a proper management of the estate, were satisfied by the receiver himself, or if he became bankrupt, or if other reasons rendered it advisable, by payment direct to the creditors to the extent of the assets under the control of the court. The judgment must be read in light of the fact that, as the learned judge pointed out, the estate would suffer no loss because the sureties paid the amount

(f) *Re British Power, &c.*, (g) *Re London United Co.*, [1910] 2 Ch. 470; see *Re Breweries*, [1907] 2 Ch. 511. *Johnson*, 15 Ch. D. 548.

Chap. IX. of the deficiency ; it cannot therefore be considered to conflict with the principles enunciated in the later case above cited (*h*).

Borrowing by manager. If a receiver and manager requires money to enable him to carry on the business entrusted to him, the court will give him liberty to borrow upon the security of the property in his control and as a first charge upon the whole undertaking, in priority even to debentures, if the money is necessary for the preservation of the assets and the goodwill (*i*) ; leave will not, however, be given if the borrowing will not benefit either the company or the debenture holders (*k*) : thus, leave will not be given without a prior incumbrancer's consent where there is a larger amount due on the prior incumbrance than the property is likely to realise (*l*).

Where a receiver and manager appointed in a debenture-holders' action has been authorised to raise money, this gives him by implication power to create a charge to secure the money in priority to existing debentures (*m*). The order ought always to state whether the charge is, or is not, to be subject to the receiver's right of indemnity (*n*). In order to secure the money raised the receiver sometimes gives a certificate, sometimes a charge ; or the amount may be raised on the security of debentures (*o*). In a

(*h*) *Re British Power, &c., Co.*, [1910] 2 Ch. 470, *supra*.

(*i*) *Greenwood v. Algeciras Railway Co.*, [1894] 2 Ch. 205.

(*k*) *Securities and Properties Corp. v. Brighton Alhambra*, 62 L. J. Ch. 566.

(*l*) *Re Thames Ironworks*, [1912] W. N. 66 ; 106 L. T. 674 ; and *ante*, p. 296.

(*m*) *Lathom v. Greenwich Ferry Co.* (1895), W. N. 77 ; 72 L. J. 790.

(*n*) See *Re Glasdir Copper Mines*, [1906] 1 Ch. 365. Form of order, Seton, 7th ed., 764.

(*o*) See *Palmer's Company Precedents*, Part III., 10th ed., Chap. 68, and p. 633 for form of certificate.

case where the receiver was authorised to borrow £700 and, not requiring all the money at once, overdrew £500 from the bank and afterwards paid off the overdraft, it was held that he had not exhausted his borrowing powers to the extent of £500, but was still able to borrow the entire £700 without further leave (p). Chap. IX.

The claim of persons who have advanced money to receivers and managers under an order of the court upon security of a charge on the assets, is, unless the order otherwise directs, postponed to the receiver's right to his costs, charges and expenses (q), including remuneration (r), and to plaintiff's costs of realisation (s). The receiver will not be deemed to have waived his rights in this respect except in a plain case (t); he is under no personal liability for the sums advanced (u) unless the contract provides otherwise.

Where a manager had contracted in part in excess of an authorised amount, with an express provision that he was not to be personally liable, an application by the creditor for payment out of the assets, or by the receiver personally, was dismissed as being capable of being dealt with on taking the receiver's accounts (x).

Inasmuch as the property entrusted to him as manager includes the goodwill, the court will restrain deliberate acts Inter-
ference
with
mana-
ger (y).

(p) *Milward v. Avill and Smart* (1897), W. N. 162.

(q) *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Re A. Boynton*, [1910] 1 Ch. 519.

(r) *Re Glasdir Copper Mines*, [1906] 1 Ch. 365. As to extent to which receiver is entitled to claim indemnity, see *ante*, p. 300.

(s) *Re A. Boynton*, [1910] 1 Ch. p. 525.

(t) *Re Glasdir Copper Mines*, [1906] 1 Ch. 365.

(u) *Re A. Boynton*, [1910] 1 Ch. 519.

(x) *Re Ernest Hawkins & Co.*, 31 Times Rep. 257.

(y) See, further, Chap. VI.

Chap. IX. calculated to destroy it, either by a party or a stranger : inducing employees to leave a business which is being carried on under the direction of the court, with a view to their employment in another business which is being started in opposition, and attempting to obtain a tenancy of a field, which, to the knowledge of the person making the attempt, had been occupied in connection with the business, are such acts of interference and will be restrained by injunction (z). Deliberate acts of interference are a contempt of court and may be punished as such (a) ; it is such an act of interference for one of the partners in the original business to start or conduct a competing business in such a way as to improperly injure the original business when under the control of the court, as for instance by representing by circulars that the latter business is no longer carried on (b).

Interest of
manager
must not
conflict
with his
duty.

A receiver and manager, being an officer of the court, must not place himself in a position in which his interest will conflict with his duty : accordingly, where a receiver and manager had been appointed over the undertaking of a railway company, it was held that he must not enter into partnership with the company and use his own steamboat in conjunction with the company's traffic by issuing through tickets for use on the steamboat and the company's railway (c).

Public
company.

Although the court will, in the case of a private trade or

(z) *Dixon v. Dixon*, [1904] 1 Ch. 161. The acts complained of were done by a defendant to the action. Acts of *bonâ fide* trade competition by strangers would not be restrained, although their effect might destroy the goodwill.

(a) *Taylor v. Soper*, 62 L. T. 828. See generally as to interference with a receiver, Chap. VI., ante.

(b) *King v. Dobson*, 56 S. J. 51.

(c) *Re Eastern and Midland Railway Co.*, 90 L. T. Jo. 20.

business, appoint a manager, the case is different where Chap. IX.
 a company has been incorporated, and empowered by the
 Legislature, acting for the public interest, to construct and
 maintain an undertaking for a public purpose, and the
 Legislature has imposed powers and duties of an important
 kind on the company. Inasmuch as these powers and
 duties have been conferred and imposed on the company
 and on no other body of persons, the powers must be
 executed and the duties discharged by the particular
 company: they cannot be delegated or transferred.
 Accordingly, although the court may appoint a receiver,
 it will not appoint a manager of the undertaking of such
 a company at the instance of a debenture holder; inas-
 much as what a debenture, in the form scheduled to the
 Companies Clauses Consolidation Act, 1845, gives is only
 a charge on the company's undertaking, which charge is
 not to interfere with the carrying on the business of the
 company, and no right is given to sell the undertaking (d).
 Upon this ground the court will not appoint a manager
 of a tramway company governed by the Tramways Act,
 1870 (e), and it would not formerly appoint a manager of a
 railway company (f).

The reasoning upon which these decisions are founded
 appears not to apply, where there is a specific power to
 sell under the statute which effects the incorporation, as
 is sometimes the case with statutory companies (g). If

(d) *Gardner v. London, Chat-
 ham and Dover Railway Co.*, L. R.
 2 Ch. App. 201, at pp. 212, 215-
 217, *per* Lord Cairns; *Blaker v.
 Herts and Essex Waterworks Co.*,
 41 Ch. D. 399.

(e) *Marshall v. South Stafford-
 shire Tramways Co.*, [1895] 2

Ch. 36, disapproving *Bartlett v.
 West Metropolitan Tramways Co.*,
 [1893] 3 Ch. 437; [1894] 2 Ch.
 286.

(f) *Gardner v. London, Chat-
 ham and Dover Railway Co.*,
 L. R. 2 Ch. App. 201.

(g) See *Re Crystal Palace Co.*,

Chap. IX. there is a power to sell and therefore to cause the conduct and management to devolve on other persons than those specified by the statute, it would appear that a manager might be appointed.

Railway
company.

Under the provisions of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4, made perpetual by the Act 38 & 39 Vict. c. 31, a creditor who has recovered judgment against a railway company may now obtain the appointment not only of a receiver, but also, if necessary, of a manager of the undertaking of the company, on application by petition in a summary way to the Chancery Division of the High Court (*h*).

Whether the court has jurisdiction, under this 4th section, to appoint a receiver of a railway company's undertaking before the railway has been opened for public traffic, is a question which, in a recent case (*i*), the Court of Appeal left undecided: but, assuming that the jurisdiction exists, the court will be disinclined to exercise it, where there is no immediate prospect of there being anything for a receiver to receive (*k*).

Where a receiver and manager appointed at the

104 L. T. 251, 898; *affd. sub nom. Saunders v. Bevan*, 107 L. T. 70. There is no power to direct a sale unless it is specifically given by the statute: see *Re Woking U.D.C. (1911) Act*, [1914] 1 Ch. 300.

(*h*) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645; *Re East and West India Docks Co.*, 38 Ch. D. 576; *Re Eastern and Midlands Railway Co.*, 45 Ch. D. 367. As to form of order, see Seton, 7th ed., pp. 736, 756.

(*i*) *Re Knott End Railway Act*,

1898, [1901] 2 Ch. 8, explaining *Re Manchester and Milford Railway Co.*, *ubi supra*. In the *Knott End* case, Rigby, L.J., expressed the opinion (doubted, however, by Vaughan Williams, L.J.) that if, before the opening of a railway for traffic, a receiver were appointed and put in possession of chattels of the railway company, the court would, on the application of a judgment creditor, order the receiver to relinquish possession.

(*k*) *Ib.*

instance of a judgment creditor is already in possession Chap. IX. of a railway company's undertaking, another receiver and manager will not be appointed on the application of another judgment creditor (*l*).

In exercising its jurisdiction under the Act of 1867, the court will take into consideration the present position and exigencies of the railway company, and will act for the general benefit of all the creditors (*m*).

As a general rule, in cases under the Act of 1867, the directors or secretary of the company, or some of those persons, will be appointed by the court to be managers, where they are acting fairly, and the order for the appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers (*n*).

The only evidence required, in support of an application by a judgment creditor, under section 4 of the Act of 1867, for the appointment of a manager, is an affidavit that he is a judgment creditor, that his judgment debt is unsatisfied, and that the company is a going concern, carrying on its own business and conducting its own traffic in the ordinary way (*o*).

Although a receiver may be appointed of the tolls of a market, the court will not appoint a manager of a market ^{of market, &c.} belonging to a municipal corporation and regulated by statute, because this would amount to an administration of the affairs of a corporation (*p*).

(*l*) *Re Mersey Railway Co.*, 37 *Railway Co.*, 14 Ch. D. 645.
Ch. D. 610.

(*m*) *Re Hull, Barnsley, &c.*, *way Co.*, 14 Ch. D. 645.

Railway Co., 40 Ch. D. 119; 57 (*p*) *De Winton v. Mayor, &c.*,
L. T. 82. *of Brecon*, 26 Beav. 542,

(*n*) *Re Manchester and Milford*

Chap. IX. Where an action relates to property in a colony or in a foreign country, which partakes of the nature of a trade, it is competent for the court to appoint a manager. In a case relating to a West Indian estate, it was said that a manager is appointed, not for the purpose of carrying on the management of the estate, but to enable the court to give relief, when the cause is heard (*q*). Persons, for instance, have been appointed to manage landed property, to receive the rents and profits, and to convert, get in, and remit the proceeds of property and assets, in cases in which the property has been situate in India (*r*), in the West Indies (*s*), in Demerara (*t*), and in Brazil (*u*). Thus, where the whole undertaking of a limited company is situate abroad, the court may appoint a manager: managers have been appointed of railways in Venezuela (*x*), mines in Peru (*y*), railway and mines in Chile (*z*).

A person resident in England may be appointed manager, with authority to appoint an agent abroad in the country where the property is situate (*a*); and sometimes a person resident in the country where the estate is

(*q*) *Waters v. Taylor*, 15 Ves. 10, at p. 25, *per* Lord Eldon; see, too, *Sheppard v. Oxenford*, 1 K. & J. 500.

(*r*) *Logan v. Princess of Coorg*, Seton, 7th ed., p. 776.

(*s*) Seton, 7th ed., p. 778; see, too, *Barkley v. Lord Reay*, 2 Ha. 308.

(*t*) *Bunbury v. Bunbury*, 1 Beav. 336; *Bentinck v. Willink*, 1 L. T. 410.

(*u*) *Sheppard v. Oxenford*, 1 K. & J. 500; as to form of order, see *ib.* 501. See, too, *Duder v.*

Amsterdamsch Trustees Kantoor, [1902] 2 Ch. 132, 144, where the same persons were appointed receivers in two actions for enforcing different claims on the same property.

(*x*) *Re South Western of Venezuela Railway Co.*, [1902] 1 Ch. 701.

(*y*) *Re Huinac Copper Mines*, [1910] W. N. 218.

(*z*) *Re Arauco Co., Ltd.*, 79 L. T. 336.

(*a*) Seton, 7th ed., p. 777; Palmer, Vol. III., Chap. 75.

situate is appointed manager (b). Where a receiver and manager appointed over mines in Peru belonging to a limited company, was unable to obtain possession because the *lex loci* only recognised the title of the company, the court ordered the company to appoint two attorneys to take possession on behalf of the receiver (c). It is not the practice in such cases to direct the attorneys to give security (d). Chap. IX

A person who obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such receiver or manager under the powers of any instrument, must within seven days give notice to the registrar of companies, who thereupon enters the fact upon the register of mortgages (e). Notice to registrar of companies.

In the absence of a restrictive covenant, the receiver and manager of a business may, on ceasing to act, set up a similar business on his own account, and solicit orders from, or do business with, customers of the business of which he was formerly manager (f). Manager on ceasing to act may set up similar business.

CONSIGNEES.

In cases where the manager of an estate must necessarily reside in the country where the estate is situated, it was formerly usual to add to the order directing the appointment of a manager an order for the appointment Consignee.

(b) Seton, 7th ed., p. 777. give security.

(c) *Re Huinac Copper Mines*, [1910] W. N. 218. It is not the practice to direct that an attorney, allowed to be appointed in respect of property out of the jurisdiction, should (d) *Per* Warrington, J., in Chambers, 18th January, 1912.

(e) Companies (Consolidation) Act, 1908, s. 94.

(f) *Re Irish*, 40 Ch. D. 49; *Re Gent*, 40 W. R. 267.

Chap. IX. of a consignee or consignees resident in this country, to whom the produce of the property in question might be remitted, and by whom it might be disposed of (g).

Under modern commercial practice the appointment of a consignee can be seldom necessary or advisable, the produce being sold *in situ* or consigned to commercial agents. The present practice in such cases is to appoint a receiver in this country with power to appoint attorneys managers or local agents abroad, with such directions as to disposal of money in the hands of the latter as may be required in any particular case (h). The succeeding paragraphs are retained, as it is possible that in some instances the appointment of a consignee, or a person with analogous powers, may still be made.

A consignee, acting under an appointment by the court, is the paid agent of the court, to manage the estate which is in the hands of the court (i).

The right of the consignee of a West Indian estate, which gives him a lien on the plantation in respect of the balance due to him, is an exception from the general rule which applies to principal and agent (k).

Mode of appointment of manager and consignee.

The course of proceeding under an order for the appointment of a manager and consignee is the same as that under an order for the appointment of a receiver, and the Rules of the Supreme Court which apply to receivers apply to managers and consignees also (l).

Security must generally be given.

In some cases a manager of a West Indian estate has been appointed without giving any security (m); but, in

(g) Seton, 7th ed., p. 778.

(k) *Chambers v. Davidson*,

(h) See, for instance, form of order, Palmer's Comp. Prec., Vol. III., p. 763.

L. R. 1 P. C. at p. 305.

(l) R. S. C. Ord. 71, r. 1 (interpretation of the word "receiver").

i) *Morison v. Morison*, 7 D. M. & G. 226.

(m) Seton, 7th ed., p. 779.

Rutherford v. Wilkinson (n), Lord Gifford, M.R., intimated Chap. IX. that that had been done only under special circumstances, and that in general, to warrant such a course, it should appear that no manager could be found who would give security, or that the person proposed was fit to be appointed without security. Under the particular circumstances of that case, he made the order for the appointment without security, by consent of such of the parties to the cause as could consent ; but on a subsequent application in the same cause security was required (o).

A manager or consignee in England, unless he is the trustee or other legal holder of the property, is required to give the usual security to account for what he may receive (p), and ordinarily a person appointed to act abroad as manager must give the like security as a person resident in this country (q).

The manager of a West Indian estate is not required to give security to manage faithfully. Having a discretion given him to expend money on the estate, he is only required to give security to account for what he shall receive, and to consign so far as the due management of the estate permits (r). In a case where a testator had directed that a particular person should be appointed "receiver" of his rent and personal estates, and he died seised of no real estate, except an estate in the West Indies, the person named was appointed receiver, agent, and consignee, upon his entering into a personal recognisance to account for the produce (s).

(n) Ib. 780.

(r) *Morris v. Elme*, 1 Ves. Jr.

(o) Ib. 780.

139.

(p) R. S. C. Ord. 50, r. 16.

(s) *Hibbert v. Hibbert*, 3 Mer.(q) Ib. ; *Cockburn v. Raphael*, 681.

2 Sim. & St. 453.

Chap. IX. An executor or trustee may be appointed consignee (t).

Executor or trustee may be appointed consignee. The appointment of a defendant, who is an executor or trustee, to be a consignee with the usual profits is a matter for the discretion of the court ; but, when such a discretion has been exercised, and an appointment made under it has been acted on, the court will not afterwards withdraw its sanction from the appointment (u).

Consignee, when not answerable for orders received. A consignee appointed by the court, like any other servant or agent of the court, if not affected with fraud or improper conduct, is not answerable for the wisdom, correctness, or propriety of the orders which he receives, or for the directions by which his acts are sanctioned (x).

Consignees have a charge on the property for payments authorised by the court. Consignees appointed by the court in an administration action have a charge on the property for payments sanctioned by the court, in priority to incumbrances created before the action, and will be allowed interest on a balance due to them (y). In *Re Tharp* (z) Lord St. Leonards allowed a consignee appointed by the court to be reimbursed from English estates of the same owners, although he was not receiver of the rents of those estates.

Manager appointed to act in the event of the death of present manager. The court, in dealing with property in a colony, may provide against the inconveniences likely to arise from the death, absence, or incapacity of an existing manager, by appointing another person to act as manager in any of those events (a).

In *Forbes v. Hammond* (b) a reference to chambers was granted, to approve of a proper person to succeed

(t) *Marshall v. Holloway*, 2 Sw. 432.

(u) *Morison v. Morison*, 4 M. & C. 215.

(x) *S.C.* 7 D. M. & G. 214 at p. 223.

(y) *S.C.* 2 Sm. & G. 564 ; 7 D. M. & G. 214.

(z) 2 Sm. & G. 578.

(a) *Rutherford v. Wilkinson*,

Seton, 7th ed., p. 780.

(b) 1 J. & W. 88, 89.

the consignee of a West Indian estate in the event of his death, he being in a dangerous state of health; but this was done doubtingly, the Master of the Rolls observing that the person approved of might cease to be a proper person before the time when his office was to commence. He further remarked, on making the order, that the question must come before the court again on the report.

It was held in one case that a receiver and manager of a West Indian estate, who had been appointed at the instance of a mortgagee, was not entitled to the produce of crops severed and shipped to the consignee of the mortgagor prior to the appointment of the receiver and manager, although the crops had not, at the date of the order appointing the receiver and manager, been received by the consignee (c). Manager not entitled to crops severed before his appointment.

The manager of a West Indian estate is entitled to a commission as long as he is resident in the island or colony, and is personally acting in the management of the estate (d). The commission is the reward of his personal care and attention (e). If and while he is absent from the island or colony, he is not entitled to charge commission, but he may be allowed any sums which he may have actually paid to others for the management of the estate during his absence, provided the payments were in themselves reasonable (f). Commission of manager. Allowances.

Where the court has taken possession of an estate by a manager or consignee, it will, as against all parties for whose benefit the possession has been held, refuse to Manager or consignee not discharged

(c) *Codrington v. Johnstone*, 1 Beav. 520.

(e) *Chambers v. Goldwin*, 9 Ves. 273.

(d) *Forrest v. Elwes*, 2 Mer. 69.

(f) *Forrest v. Elwes*, 2 Mer. 68, at p. 70.

Chap. IX. permit its officer to be discharged until the amount
 until the amount due to him has been paid. due to him his ordinary commission and allowances, and also to a
 has been lien on the estate, as against all persons interested in it,
 paid. for the balance, whatever it may be, that may be found
 due to him on taking his accounts (h).

Where a balance is found due to a consignee on a final settlement of accounts, he will not be discharged until that balance is paid, and, if payment cannot be made without interfering with the inheritance or *corpus* of the estate, the court will be justified in resorting to it for the purpose of doing justice to the consignee (i). But the case is different where, pending the consigneeship, an order is sought by a consignee that a balance found due to him may be paid out of the *corpus*. A consignee cannot, during the continuance of his office, come to the court from time to time, as often as there is a balance in his favour, and ask for payment of it out of the *corpus* of the estate (k).

(g) *Fraser v. Burgess*, 13 Moo.
 P. C. 346.

(i) *Farquharson v. Balfour*, 8
 Sim. 213.

(h) *Bertrand v. Davies*, 31
 Beav. 436.

(k) *Ib.*

CHAPTER X.

SALARY AND ALLOWANCES OF A RECEIVER.

A RECEIVER will, unless it is otherwise ordered, or Chap. X. unless he consents to act without a salary, be allowed a proper salary, or have allowances made to him for his care and pains in the execution of his duties (a). And, even where he has consented to act without a salary, he will be entitled to be paid for services which have proved beneficial to the estate, and which it was no part of his duty to perform, *e.g.*, working as a mechanic in a business of which he has, by the order appointing him, been constituted manager (b). Where the order appointing a receiver says nothing about remuneration, this does not amount to a decision that he is to have no remuneration, even though he be a trustee, who as a general rule receives no remuneration (c). The amount of a receiver's salary or allowance is usually not fixed until the passing of his first account, and often, especially in the case of companies, not till later, when he will be allowed either a percentage upon his receipts, or a gross sum by way of salary (d).

Under very special circumstances an order has been

(a) R. S. C. Ord. 50, r. 16. As to receivers in lunacy, see Rules in Lunacy, 1892, r. 83.

(b) *Harris v. Sleep*, [1897] 2 Ch. 80.

(c) *Re Bignell, Bignell v. Chapman*, [1892] 1 Ch. 59.

(d) Dan. Ch. Pr., 7th ed., 1441. It is usually fixed by the Master, but sometimes fixed and allowed by the Taxing Master: *Silkstone, &c., Coal Co. v. Edey*, [1901] 2 Ch. at p. 655.

Chap. X. made that the receiver be allowed such salary as the judge may, on the passing of each account, think reasonable (e).

A receiver and manager will not be allowed remuneration for any period beyond the term of his appointment, unless an extension is made before it expires (f).

Where the court appoints a receiver with a salary, it is incumbent upon him to pay out of his own pocket any expenses which he may incur in giving security, either by a bond with sureties, or by means of a guarantee society. But, if he is appointed without salary, he will be allowed in his accounts expenses reasonably incurred by him for that purpose (g).

Amount of allowance. There is no settled scale governing the allowance to a receiver. According to a rule laid down by Lord Langdale in *Day v. Croft* (h), the allowance to a receiver of the rents and profits of a freehold or leasehold estate was, at that time, generally 5 per cent. on the amount received. That allowance might, however, be increased if there was any special difficulty in the collection; or it might be diminished; or a fixed salary might be allowed where the rental was considerable (i). The practice at the present time is similar: 5 per cent. on the amount received is usually allowed to a receiver who collects rents, but in some cases up to 10 per cent. has been allowed; but on gross sums received the percentage is usually from $1\frac{1}{2}$ to $2\frac{1}{4}$ per cent. In the case of receivers and managers there is no fixed scale. They are often allowed 5 per cent. on the receipts (k): in other cases their remuneration is

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| (e) <i>Neave v. Douglas</i> , 26 L. J. Ch. 80. | |
| Ch. 756. | (h) 2 Beav. 491. |
| (f) <i>Re Wood Green and Hornsey Laundry</i> , [1918] 1 Ch. 423. | (i) Seton, 7th ed., 739. |
| (g) <i>Harris v. Sleep</i> , [1897] 2 | (k) <i>Palmer's Comp. Prec.</i> , Vol. 1, p. 788. |

regulated by the time employed by the receiver, his partners and clerks. In such cases a time account is required (l). A statement of particulars of work done is also sometimes required from receivers and managers to enable the rate of remuneration to be fixed (m). Chap. X.

A receiver and manager appointed to wind up or carry on a partnership business is, in the absence of express stipulation, entitled to a *quantum meruit* (n), though he is himself a partner, irrespective of his liabilities to the partnership as a partner (o); but the scale allowed to liquidators is not a guide (p).

A receiver cannot claim remuneration until he has discharged sums for which he is accountable under his security (q).

A receiver is entitled to have out of the funds collected or realised by him his costs, charges, and expenses properly incurred in the discharge of his ordinary duties, or in the performance of extraordinary services which have been sanctioned by the court (r). Where a receiver has paid sums out of his own pocket in satisfaction of legacies, he will be reimbursed (s). And similarly, in a suit to administer a West Indian estate, a consignee appointed by the court, who had become in advance to the estate, was held entitled to repayment out of the

(l) Form ib., pp. 789, 790.

(m) Form ib., p. 790.

(n) *Davy v. Scarth*, [1906] 1 Ch. 55, and see p. 251.

(o) *Davy v. Scarth*, *supra*.

(p) See *Prior v. Bagster* (1887), W. N. 194.

(q) See *Re British Power Traction Co.*, [1910] 2 Ch. 470.

(r) *Malcolm v. O'Callaghan*, 3

M. & C. 52; and see *supra*, p. 247. In bankruptcy a receiver is entitled to his costs next after the costs of realising the estate: *Ex parte Royle*, 23 W. R. 908. As to costs of receiverships in the King's Bench Division, see 34 Sol. J. 74, 90.

(s) *Palmer v. Wright*, 10 Beav. 236.

Chap. X *corpus* of the estate, in priority to the costs of the suit (*t*).

It is not generally necessary for a receiver to make any special application to the court for the payment of his costs, charges, and expenses properly incurred in the discharge of his duties (*u*).

The payment of the costs, charges, and expenses, including his remuneration (*x*), of a receiver appointed over an estate is not dependent on the sufficiency of the estate to bear all the costs. This right is not affected by his bankruptcy, but the sum due to him will not be paid out to the trustee in bankruptcy, but to the persons entitled by subrogation (*y*). Thus a receiver appointed over the assets of a company is entitled to be paid next after payment of the costs of realisation (*z*), and even in priority to persons advancing money under an order of the court on the terms that repayment is to be a first charge on the assets (*a*). His claim is, however, limited to the amount of the assets. A receiver and manager appointed in a partnership action has, therefore, no claim against the partners personally, if the assets are insufficient to

(*t*) *Morison v. Morison*, 7 D. M. & G. 215.

(*u*) *Fitzgerald v. Fitzgerald*, 5 Ir. Eq. 525; but he may do so personally if it is necessary: form of summons, Palmer, Vol. III., p. 792.

(*x*) *Re Glasdir Copper Mines*, [1906] 1 Ch. 365.

(*y*) *Re London United Breweries*, *infra*.

(*z*) *Batten v. Wedgwood, &c.*, Co., 28 Ch. D. 323; *Re London United Breweries*. [1907] 2 Ch.

511. The plaintiff is entitled to his costs of realisation as between solicitor and client, if the estate is deficient for payment of the debentures in full see *Re A. Boynton, Ltd.*, [1910] 1 Ch. 519.

(*a*) *Strapp v. Bull, Sons & Co.*, [1895] 2 Ch. 1; *Re Glasdir Copper Mines*, [1906] 1 Ch. 365; *Re A. Boynton, Ltd.*, [1910] 1 Ch. 519. As to a partner, *supra*, p. 319.

discharge the whole of the amount due to him, although he may have been appointed under a consent order (b). Chap. X.

A receiver appointed over mortgaged property (c), who goes into possession with a direction to keep down interest on incumbrances and receives the rents of the property with the knowledge of the mortgagee, is entitled to deduct his remuneration and expenses before paying over to a mortgagee the balance of rents in his hands to which the latter is entitled (d).

It seems that if a receiver is directed to pay to a successful litigant costs of proceedings to which the receiver is a party, that such costs will be payable in priority to his own claim for costs, charges, and expenses (e). A proceeding, however, is rarely brought in the receiver's own name, and where it is brought, *e.g.*, by the liquidator of a company on an indemnity from the receiver, the liability to the liquidator for costs paid by him will, it appears, in default of order to the contrary, have no precedence over other liabilities of the receiver.

When the court gives a receiver authority to advance money for the benefit of the estate of which he is receiver, it generally allows him interest at 5 per cent. on the sum which it authorises him to advance, and gives him a charge on the assets for that sum and interest (f). If a receiver advances money without such previous authority, he is entitled only to an indemnity out of the assets (g).

A receiver has not such a vested right to the collection

(b) *Boehm v. Goodall*, [1911] 1 Ch. 155. liquidator: *Re Pacific Coast Syndicate, Ltd.*, [1913] 2 Ch. 26.

(c) See also p. 268, *ante*.

(f) *Ex parte Izard*, 23 Ch. D.

(d) *Davy v. Price* (1883), 80.

W. N. 226.

(g) *Ib.*

(e) As is the case with a

K.R.

Chap. X. of money payable in respect of the estate over which he is receiver as to be entitled to prevent such money from being paid into court without passing through his hands, where poundage may be saved by a direct payment into court. Lord Langdale accordingly, in *Haigh v. Grattan* (*h*), made an order, on the petition of some of the parties interested, that a debtor, who was willing to pay the amount of his debt to the Accountant-General at once, should be at liberty to do so (*i*).

Extra-ordinary expenses.

A receiver may be granted allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties (*k*), or in bringing actions, or in defending legal proceedings which have been brought against him (*l*), even though defended without leave (*m*), though leave should always be obtained as soon as the action against the receiver is commenced (*n*). Where, for example, an adverse application had been made against a receiver by a party to the cause, and had been refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified, and to have his costs as between solicitor and client out of a fund in hand, although it belonged to incumbrancers (*o*).

Again, where one of two partners in a business of

(*h*) 1 Beav. 201.

(*i*) See, too, *Weale v. Ireland*, 5 Jur. 405; and, as to the practice in lunacy, *Ex parte Clayton*, 1 Russ. 476; *Ex parte Cranmer*, ib. 477 n.

(*k*) *Potts v. Leighton*, 15 Ves. 276; *Harris v. Sleep*, [1897] 2 Ch. 80.

(*l*) *Bristowe v. Needham*, 2 Ph.

190; *Re W. C. Horne & Sons, Ltd.*, [1906] 1 Ch. 271. Distinguished *Re Dunn*, [1904] 1 Ch. 648; *infra*, p. 324.

(*m*) *Bristowe v. Needham*, *supra*: the defence succeeded.

(*n*) *Anon.*, 6 Ves. 286.

(*o*) *Courand v. Hanmer*, 9 Beav. 3. Distinguish *Re Dunn*, *ubi supra*.

agricultural implement makers, being the defendant in an action for dissolution of the partnership, had been appointed receiver and manager of the business without salary, he was allowed in his accounts £2 a week, as wages, for a period of 18 months during which he had worked as a common workman in the business of which he was receiver. The Court of Appeal, however, pointed out that, in not asking for the wages at the time of his appointment, he had committed a technical irregularity, and had run a great risk of not getting any remuneration for his extraordinary services (p). The costs of litigation undertaken with the permission of the court to preserve the assets are part of the receiver's costs of administration and ought to be included in his accounts (q).

If any extraordinary expenses have been incurred by the receiver, allowances for them will not generally be sanctioned, unless they have been incurred with the approbation of the court or judge (r), or unless the estate has been benefited thereby (s). Accordingly, where a receiver, without the leave of the court, defended an action arising out of a distress for rent made by him, and compromised it on the terms of the plaintiff abandoning it and each party bearing his own costs, he was not allowed his costs (t). So, where the receiver of a lunatic's

(p) *Harris v. Sleep*, [1897] 2 Ch. 80, at pp. 84, 85.

(q) *Re W. C. Horne & Sons, Ltd.*, [1906] 1 Ch. 271: these costs had been omitted from the receiver's accounts and the solicitor was granted a charging order.

(r) *Re Ormsby*, 1 Ba. & Be. 189; *Ex parte Izard*, 23 Ch. D. 80. As to allowances to a

receiver and manager in respect of liabilities incurred by him, see p. 300.

(s) *Bristowe v. Needham*, 2 Ph. 190; *Malcolm v. O'Callaghan*, 3 M. & C. 58; and see *Viola v. Anglo-American Cold Storage Co.*, [1912] 2 Ch. at p. 311.

(t) *Swaby v. Dickon*, 5 Sim. 629.

Chap. X. estate instituted proceedings in a wrong form, which proceedings he abandoned, and then adopted a form of action in which he succeeded, he was refused the costs of the abandoned proceedings, although the Master reported that he had acted *bonâ fide* (u).

A receiver appointed and acting in proceedings for the administration of an estate is not entitled to indemnity in respect of the costs of defending a purely personal action against him, having no relation to the estate except so far as the acts complained of were done by him while acting as an officer of the court. No benefit to the estate can result from his defending such an action (x). Nor is he entitled to litigate for the profit of his receivership; his only interest is in his percentage (y).

The receiver of an estate is not entitled to be reimbursed the expenses of journeys to and residence in a foreign country, for the purpose of prosecuting proceedings before the tribunals of that country for the recovery of property belonging to the estate, unless he has the express sanction and authority of the court for such journeys and residence (z). If, however, such proceedings are successful, and it appears that the success has been due to, or has arisen from, the presence of the receiver, the court may consider it inequitable for the parties to take the benefit of the receiver's exertions without defraying the expenses which have attended them, although no previous authority for incurring them was given (a). The fact that some of the parties interested in the estate may

- (u) *Re Montgomery*, 1 Moll. 255.
 419. (z) *Malcolm v. O'Callaghan*, 3
 (x) *Re Dunn*, [1904] 1 Ch. M. & C. 52.
 648, at pp. 655, 657. (a) *Ib.*, at p. 58.
 (y) *Ex parte Cooper*, 6 Ch. D.

have given the receiver authority furnishes no ground for the allowance by the court of his expenses out of the estate (b). Chap. X.

If the property in dispute is small, the court may appoint a receiver without a percentage (c).

If a trustee (d), or party interested, asks leave to propose himself as receiver he will usually be required, if appointed, to act without salary (e). In a case, however, where a testator had appointed as trustee and executor a person who for many years had been the paid receiver and manager of his estate, the court appointed him as receiver at a salary, the tenant for life being an infant (f). For there is no inflexible rule that a trustee can only be appointed receiver on the terms of his having no remuneration (g). Trustee
receiver.

Where a receiver in an action is served with a petition in it, which makes no personal charge against him, he should not appear, and will get no costs of appearance if he does (h). But in a case under the old practice, in which a receiver had incurred costs which the parties had long neglected to provide for, he was allowed to petition for the payment of them (i).

(b) *Ib.*, at p. 61.

(c) *Marr v. Littlewood*, 2 M. & C. 458.

(d) *Sykes v. Hastings*, 11 Ves. 363; *Pilkington v. Baker*, 24 W. R. 234; *supra*, p. 145.

(e) *Seton*, 7th ed., pp. 729, 740; *supra*, pp. 144, 145.

(f) *Newport v. Bury*, 23 Beav. 30.

(g) *Re Bignell*, *Bignell v. Chapman*, [1892] 1 Ch. 59; and *ante*, p. 145.

(h) *Herman v. Dunbar*, 23

Beav. 312. The statement in the text applies, it is conceived, *mutatis mutandis*, to motions and summonses. In *General Share Co. v. Wetley Brick Co.*, 20 Ch. D. 260, 267, an applicant who had improperly served the receiver was ordered to pay his costs of appearance but the circumstances were peculiar.

(i) *Ireland v. Eade*, 7 Beav. 55; *supra*, p. 247.

Chap. X. If a receiver suffers any costs to accrue which ought to have been prevented, he may have to pay them out of his own pocket (*k*).

The costs of drawing out a scheme of an estate over which a receiver has been appointed, and of the holdings of the tenants, are chargeable, if at all, as part of the receiver's costs, and not of the solicitor's; but it is not certain, to say the least, that any allowance will be made to the receiver for such an item where he is paid by a percentage, though it may be necessary for the due performance of his duties (*l*).

If the exertions of a receiver of an estate have been successful in creating a benefit for the estate, an allowance will be made to him for the costs to which he has been put (*m*), but no costs will be allowed of an unsuccessful defence conducted without the leave of the court (*n*), or of proceedings improperly taken and abandoned, although the receiver may have acted *bonâ fide* and have succeeded in subsequent proceedings (*o*).

In a case in which a receiver appointed by the Court of Chancery was directed by the order appointing him to make a specified payment to a party to the suit, but, instead of doing so, he, without the leave of the court, paid the money to judgment creditors of that party, pursuant to a garnishee order obtained by the creditors in their action, the creditors were ordered, on motion in the suit by the party aggrieved, to repay the money so paid

(*k*) *Cook v. Sharman*, 8 Ir. Eq. 515. As to costs which will or will not be allowed to a receiver in London, see *Sadlier v. Greene*, 2 Ir. Ch. 330.

(*l*) See *Re Catlin*, 18 Beav. 511.

(*m*) *Bristowe v. Needham*, 2 Ph. 190; *supra*, pp. 259, 322.

(*n*) *Swaby v. Dickon*, 5 Sim. 681; *supra*, pp. 259, 324.

(*o*) *Re Montgomery*, 1 Moll. 419.

to them, and a direction was also given that, in default of such repayment, the amount should be disallowed to the receiver on the passing of his account. And the receiver, as well as the creditors, was held liable to pay the costs of the motion (*p*). Chap. X.

The receiver of an estate may be granted an allowance for money laid out on the estate without previous order, on its being ascertained that the expenditure has been beneficial to the estate (*q*).

In a case where the receiver's default in bringing in his accounts on the appointed days was known to the parties, and the accounts had been passed and poundage allowed without objection, no loss having been sustained by the receiver's fault, and no balance being due from him, the court would not afterwards listen to an application to strike out his allowance of poundage and costs at the instance of the parties who had the benefit of his services (*r*); but the amount of the allowance made to a receiver may be reconsidered, where, though an objection was originally made to it, the particular circumstances of the case and the nature of the items were not taken into consideration (*s*).

A receiver, who passes his accounts and pays his balances regularly, is not entitled on that ground to make interest for his own benefit, out of moneys which come into his hands, in his character of receiver, during the intervals between the times of passing his accounts (*t*). Receiver may not make interest on balances in hand.

If it is necessary, not from the conduct of the parties, but owing to the condition of the estate, to have a receiver Life estate subject to

(*p*) *De Winton v. Mayor, &c.*,
of *Brecon*, 28 Beav. 204.

(*q*) See pp. 260, 261.

(*r*) *Ward v. Swift*, 8 Ha. 139.

(*s*) *Day v. Croft*, 2 Beav. 488.

(*t*) *Shaw v. Rhodes*, 2 Russ.
539; see, too, *Earl of Lonsdale*
v. Church, 3 Bro. C. C. 40.

Chap. X. appointed over the estate of a tenant for life of real estate,
 expenses of receiver. it is an expense to which the estate for life is inherently
 subject. In such a case it is the right of the remainder-
 man to have a receiver appointed, and to have the ordinary
 expenses incidental to the appointment paid out of the
 life estate (u).

Receiver in lunacy. The authority of a receiver in lunacy expires with the
 death of the patient; he will not be given credit in his
 accounts for sums paid, nor is he nor are his sureties
 chargeable in the lunacy for sums received, after that
 date (x).

(u) *Shore v. Shore*, 4 Drew. 2 Ch. 318. The receiver would,
 510. it is suggested, be liable as

(x) *Re Walker*, [1907] 2 Ch. executor *de son tort*.
 120; and see *Re Bennett*, [1913]

CHAPTER XI.

ACCOUNTS.

UNDER the old practice the accounts of a receiver appointed by the court were required to be delivered annually (a); but under the present practice the Master, at his discretion, fixes a longer or shorter period for a receiver to leave and pass his accounts, and also the days on which the receiver shall pay the balances appearing due on the account or such part thereof as shall be certified as proper to be paid by him (b). The accounts must be delivered at the judge's chambers on or before the days appointed for the purpose (c). If the receiver should be unable to complete his accounts by the day fixed he may apply for further time by summons in chambers (d).

Where the receiver is appointed in an action in the Chancery Division commenced in a district registry, other than the Manchester or Liverpool Registry, the registrars of which have all the powers of a Master in

(a) See Beames' Ch. Ord. 463.

(b) R. S. C. Ord. 50, r. 18. Where the expenses of attending and passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only: *Day v. Croft*, 20 L. J. Ch. 423.

(c) This was so under the old practice also: see Bloxam on Regulations to be Observed in

the Conduct of Business at Chambers, published in the year 1857; see, too, Dan. Ch. Pr., 8th ed., p. 1492.

(d) The application should properly be made by the party with the conduct, but if he refuses the receiver may make it: form of summons, Dan. C. F., 6th ed., p. 927.

Chap. XI.
Delivery
of
accounts.

Chap. XI. the Chancery Division (*e*), the accounts are taken in London, unless the order—as it may do (*f*)—directs the proceeding to take place in the registry. In King's Bench actions proceeding in a district registry the account is passed in the registry.

Form of accounts. The accounts should be made out in the form prescribed by the Rules of the Supreme Court, with such variations as circumstances may require (*g*); the title should correspond with the order appointing the receiver. In the first account which he passes, the receiver of an estate should state, in the column for observations, how each tenant holds, and every alteration should be noticed in the subsequent accounts. In this column also should be entered any remarks the receiver may think proper to make as to arrears of rent, state of repair, or otherwise (*h*). If the account is drawn up in an irregular manner, the receiver may be ordered to draw it up in a proper form, and to pay the costs occasioned by his irregularity (*i*).

Account to be verified by affidavit. It is the receiver's duty to make out his account and to verify it by affidavit. The items on each side of the account ought to be numbered consecutively, and the account to be referred to by the affidavit as an exhibit (*k*).

(*e*) See R. S. C. Ord. 35, r. 6A.

(*f*) *Re Capper*, 26 W. R. 434.

(*g*) R. S. C. Ord. 50, r. 19, and App. L., No. 14; for variation usually requisite, see Dan. C. F., 6th ed., 923. As to receiver's accounts in the K. B. D., see Central Office Regulations, set out in Annual Practice, nn. to R. S. C. Ord. 50, r. 16. As to separate accounts of real and personal estate, *Hill v. Hibbitt*, 18 L. T. 553. As to receiver's

accounts in lunacy, see Rules in Lunacy, 1892, r. 89.

(*h*) Dan. Ch. Pr., 8th ed., p. 1492. If moneys have been paid to the receiver under protest, he ought by affidavit to distinguish them from the rest: *Brownhead v. Smith*, 1 Jur. 237.

(*i*) Dan. Ch. Pr., 8th ed., p. 1492; see, too, *Bertie v. Lord Abingdon*, 8 Beav. 53, 60.

(*k*) R. S. C. Ord. 33, r. 4.

The affidavit of the receiver verifying his account should be in the form No. 22 in Appendix L. to the Rules of the Supreme Court with any necessary variations (*l*). Chap. XI.

A receiver may employ his own solicitor to carry into chambers and pass his account and will be allowed the costs, though it is a common practice to employ the solicitor of the party having the conduct, for this purpose (*m*).

The receiver leaves his account in the chambers of the judge to whom the action or matter is assigned, together with the affidavit verifying the account. An appointment is thereupon obtained by the plaintiff, or person having the conduct of the action or matter, or by the receiver's solicitor (*n*), for the purpose of passing the account (*o*). Leaving
account in
chambers.

Notice of the appointment having been obtained for the purpose of passing the account ought to be served upon the solicitors of such parties as are entitled to attend the passing of the accounts (*p*). Passing
accounts.

Under the old practice, where no directions on the subject had been given at the hearing of a cause, the court would not, on a subsequent application by petition, make an order to restrain parties entitled to attend the passing of the accounts from attending, although the

(*l*) R. S. C. Ord. 50, r. 22; see, too, Dan. C. F., p. 921.

(*m*) Dan. C. F., p. 921 (*n*); though the practice has been criticised: see *Dixon v. Wilkin-son*, 4 Drew. 619; and see also *Bloomer v. Curie*, 51 Sol. Jo. 277.

(*n*) See p. 248.

(*o*) R. S. C. Ord. 50, r. 20. On leaving the first account, a copy of the order appointing the

receiver, certified by the solicitor to be a true copy thereof, must be lodged at chambers, if that has not previously been done: Dan. Ch. Pr., 8th ed., p. 1492, note (*i*).

(*p*) As to form of notice of appointment to proceed on an account, see Dan. C. F., 6th ed., 925.

Chap. XI. result of such an order might have been a very large saving to the estate. In such a case persons interested in the residue were entitled to attend the subsequent proceedings at the cost of the estate, and the court could not order that they should attend at their own expense, and that it should be unnecessary to serve them (*q*). But under the present practice such a waste of money can be, and commonly is, prevented by means of a classification order (*r*).

At the time appointed for passing the account, the receiver's solicitor attends with the vouchers like any other accounting party, and the account is gone through before the junior clerk in the chambers of the judge. Any disputed items will be disposed of by the Master at an appointment obtained before him for the purpose. Any person, who seeks to charge the receiver beyond the amount of which he has admitted the receipt, should give him notice of his intention, stating, as far as he can, the amount sought to be charged and the particulars thereof in a short and succinct manner (*s*).

Fees.

On taking the account a fee is payable of one shilling for every £100 or fraction of £100 of the amount received on such account (*t*) (including money borrowed by the receiver (*u*)), up to a total of £200,000 in any one account. The fee is paid by the receiver and allowed in his account, unless otherwise directed (*x*). It is paid by means of

(*q*) *Day v. Croft*, 14 Beav. 29,
at pp. 31, 32; 20 L. J. Ch. 423.

(*r*) See R. S. C. Ord. 55, r. 40;
and cf. Ord. 16, rr. 9, 32.

(*s*) R. S. C. Ord. 33, r. 5.

(*t*) *Re Crawshaw*, 39 Ch. D. 552.

(*u*) *Re Crystal Palace Co.*,
unrep. Swinfen Eady, J., in

chambers, 25 May, 1910.

(*x*) Ord. as to Supreme Court
fees, 1884, Schedule, fee 72.
See Ann. Practice, 1780-3. They
are not chargeable on any money
in respect of which fee 69 (pay-
able on sale with approbation
of the judge) is payable.

a stamp impressed on or adhesive to the certificate (y). Chap. XI.

The receiver, upon passing his account, brings in also his bill of costs. The bill is then taxed, and the amount included in his disbursements. On passing his first account the receiver's costs of completing his appointment are taxed and allowed (z). Parties attending the passing of a receiver's accounts have costs from the receiver only after a judgment or order disposing of the costs of the action, and showing who are or is entitled to costs out of the rents: in other cases the costs of the parties are costs in the action. Where the parties are entitled to have their costs paid by the receiver, such costs are taxed at chambers, and paid by the receiver and included in his account (a). Sureties are not allowed costs of attending except by order (b).

In a case in which an order referred it to the taxing master to tax the plaintiff's costs of an action, including the costs and remuneration of the receivers and managers appointed in the action, and to certify the balance after making a certain deduction, it was held that the taxing master had not power to make a separate certificate for the costs alone (c).

If a receiver includes in his bill of costs charges for work done in another capacity, which he allows the taxing master to deal with and strike out without objection, he cannot afterwards recover the amount of the

(y) Ord. as to stamps, July, 1884, Schedule.

(z) Dan. Ch. Pr., 8th ed., p. 1492, note (m).

(a) Dan. Ch. Pr., 8th ed., p. 1492.

(b) *Dawson v. Raynes*, 2 Russ. 466; *Re Birmingham Brewery*, 31 W. R. 415.

(c) *Silkstone, &c., Coal Co. v. Edey*, [1901] 2 Ch. 652.

Chap. XI. sums so struck out in an action brought for that purpose (*d*).

The receiver is usually directed to hand copies of his accounts to such of the parties as are entitled to attend upon the passing thereof, and to charge for the same in his costs (*e*). But a plaintiff or a defendant entitled to attend the passing of a receiver's account is not allowed, in the taxation of the receiver's costs, a second copy of the account, if his solicitor is also the solicitor for the receiver, and has a copy in that capacity (*f*).

Allowance of accounts. The verified account, with a summary at the foot and a memorandum of allowance thereof, is signed by the Master. If any sums are disallowed, they are shown in the summary as deductions. The old practice, under which the account was entered in "the receiver's book," is obsolete.

Certificate of allowance. After the allowance of the account, a certificate of the allowance, stating the balance due from or to the receiver and the day on which any sum due from him is to be paid into court, is made and signed by the Master, and, upon being so signed, is transmitted by the Master to the Central Office, to be there filed, and is thereupon binding on all the parties to the proceedings, unless discharged or varied upon application by summons, to be made before the expiration of two clear days after the filing thereof (*g*).

Receiver must pay in moneys. An order of the court appointing a receiver usually directs payment into court without a schedule to the order. A lodgment schedule is left in chambers and

(*d*) *Terry v. Dubois*, 32 W. R. Eq. 634.
415.

(*g*) R. S. C. Ord. 55, r. 70. As to form of certificate of allowance, see *Dan. Ch. Forms*, 925.

(*f*) *Sharp v. Wright*, L. R. 1

signed by the Master, and is forwarded by him to the Paymaster's Office (*h*). The lodgment schedule signed by the Master operates in the same manner as a lodgment schedule annexed to an order (*i*). Chap. XI.

Although a receiver is only bound by his recognisance to pass his accounts at the periods appointed by the judge, he may at any time apply to the court to pay in money in his hands; and if, in the intervals between passing his accounts, he receives sums of such an amount as to make it worth while to lay them out, he ought to apply by summons for an order to pay them into court, that they may be productive for the benefit of the estate (*k*). If the receiver keeps in his hands money which he has been directed to pay into court, it is no excuse for him to say that the circumstances of the estate made it necessary to keep large sums in hand, nor will it prevent the court from directing an inquiry as to what sums might or ought to have been reasonably laid out at interest (*l*). Where the order appointing a receiver does not provide for the payment of his balances into court, the receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under a pretence of waiting for some party to the action to obtain an order upon him for payment in (*m*). He ought to apply by summons, which should be served on the parties to the action, for an order for that purpose, and that the costs

(*h*) Supreme Court Funds Rules, 1905, r. 30.

(11th ed.), Pt. 3, pp. 784-785.

(*i*) *Ib.*, r. 5.

(*l*) *Hicks v. Hicks*, 3 Atk. 274.

(*k*) *Shaw v. Rhodes*, 2 Russ. 539. As to form of summons, see Dan. Ch. Forms, 927; of orders, Palmer's Company Prec.

(*m*) *Potts v. Leighton*, 15 Ves. 273, 274; see, too, 1 Ba. & Be. 230.

Chap. XI. be allowed him in his next account ; and, unless he does so, the court may charge him with interest (*n*).

Consequences of default by receiver.

If a receiver makes default in leaving any account or affidavit, or in passing his accounts, or in making any payment, or otherwise, the receiver or the parties, or any of them, may be required to attend at chambers to show cause why the account or affidavit has not been left, or the account passed, or the payment made, or any other proper proceeding taken (as the case may be), and all proper directions may thereupon be given at chambers, or upon an adjournment into court, including the discharge of the receiver, the appointment of another, and payment of costs (*o*). If the receiver brings in his account, but does not attend to pass it, after a summons to show cause why he has not done so has been served on him, the Master may allow the sums with which the receiver has charged himself, and disallow such of his payments as he has failed to vouch (*p*). In the chambers of some of the judges of the Chancery Division, the practice is to write to the receiver personally, where accounts have not been left. If the receiver neglects to obey the order for an account a four-day order may be obtained on summons (*q*), which must be served on the receiver, and if he does not appear, the order will be made on production of an affidavit of service of the summons ; or if the default consists in not making a payment into court, of the order and certificate under which the payment ought to have

(*n*) Dan. Ch. Pr., 8th ed., 7th ed., pp. 773, 781.

p. 1493. As to form of summons, see Dan. C. F. 927.

(*p*) Dan. Ch. Pr., 8th ed., p. 1493.

(*o*) R. S. C. Ord. 50, r. 21 ; Dan. Ch. Pr., 7th ed., p. 1493.

(*q*) Form of summons, Dan. C. F. 275 ; order, Seton, 771.

As to form of order, see Seton,

been made; and the Paymaster-General's certificate of Chap. XI.
 the default must be produced in support of the application (r). The order is drawn up by the registrar, and an endorsed copy must be served personally on the receiver (s); or, if personal service of the order cannot be effected, an order giving leave to substitute service should be obtained at chambers, on an *ex parte* application by summons, supported by affidavit, and the last-mentioned order must be served in conformity with the directions thereby given (t). If after such original or substituted service the receiver neglects to obey the order, it may be enforced against him by process of contempt (u). A similar course should be pursued against a receiver who is directed to pay his balance to the parties instead of into court, and neglects to do so. It is irregular to issue a writ of *fi. fa.* for such a balance (x).

A four-day order requiring a receiver to bring in his accounts may be had by one of several joint receivers against another who is in default. For, even though joint receivers be, by the terms of their appointment, required to account jointly, each of them must bring in his accounts of what he individually receives; and, where the Master has certified that one of them is in default,

(r) Dan. Ch. Pr., 8th ed., p. 1493.

(s) See R. S. C. Ord. 41, r. 5.

(t) Dan. Ch. Pr., 8th ed., p. 1493.

(u) *Re Bell's Estate*, L. R. 9 Eq. 172.

(x) *Whitehead v. Lynes*, 34 Beav. 161, 165; affd. 12 L. T. 332. In that case, two writs of *fi. fa.*, having been improperly put in execution against a

receiver to compel payment of money, the Court of Chancery, upon the persons who had caused the writs to be issued requiring the matter to be tried at law, abstained from directing an inquiry as to the damages alleged to have been sustained by the receiver, and ordered that the matter should be tried, and the damages (if any) assessed, in an action at law.

Chap. XI. the four-day order is, of course, as long as that certificate stands (y).

The receiver in an action may be ordered to pass his accounts and pay over the balance, although the action has been dismissed (z), or the proceedings in it have been ordered to be stayed (a).

A receiver who does not pay into court money which has been found to be due to him, and which he has been directed to pay, is liable to attachment under section 4, sub-section 3, of the Debtors Act, 1869 (b).

In cases within Ord. 43, r. 6, a writ of sequestration against the estate and effects of a receiver, for disobedience to an order of the court, may be issued without the leave of the court (c).

Disallow-
ance of
salary and
charge of
interest on
unpaid
balances.

Where a receiver neglects to leave and pass his accounts, and to pay the balances thereof at the times fixed for that purpose, the judge before whom the receiver has to account may, from time to time, when his subsequent accounts are produced to be examined and passed, disallow the salary therein claimed by such receiver, and may also, if he shall think fit, charge him with interest at the rate of 5 per cent. per annum upon the balances so neglected to be paid by him, during the time the same shall appear to have remained in his hands (d).

In an old case, in which a receiver of the personal estate of a testator had been appointed, the Court of Chancery declined to charge him with interest on each sum from the time when it was received, but charged

(y) *Scott v. Platel*, 2 Ph. 229, at pp. 230, 231.

(z) *Pitt v. Bonner*, 5 Sim. 577; see, too, *Hutton v. Beeton*, 9 Jur. N. S. 1339.

(a) *Paynter v. Carew, Kay*, App. 36, 44.

(b) *Re Gent*, 40 Ch. D. 190.

(c) *Sprunt v. Pugh*, 7 Ch. D. 567.

(d) R. S. C. Ord. 50, r. 18.

him as an executor would be charged, that is by making yearly or half-yearly rests in the account (e). And the present practice is in substantial accordance with that decision (f). Chap. XI.

The remedies which have been indicated remain for the most part available against a receiver even after he has been discharged. Thus, in a case where a receiver who had been discharged had not paid in his balance, he was ordered to pay in the same, and also the amount allowed for his salary, together with interest on both sums at 5 per cent. from the day appointed, and to pay the costs of the application (g). Where, however, default had been made by the executors of a deceased receiver, the sureties were only ordered to pay interest at 4 per cent. (h). A receiver may be surcharged on his accounts, notwithstanding he has been discharged (i).

A receiver may be charged with interest on moneys improperly kept in his hands, although he has passed his accounts, and all parties have expressed themselves satisfied; and for this purpose an inquiry what money he has received from time to time, and how long he has kept it in his hands, may be directed (k). In *Anon. v. Jolland* (l), Lord Eldon intimated that, if such a case should be brought before him, it would at least be a very grave question whether the receiver should be ordered to make good any loss which might have been occasioned from a difference in the price of Government funds

(e) *Potts v. Leighton*, 15 Ves. 273.

(h) *Clements v. Beresford*, 10 Jur. 771.

(f) See R. S. C. Ord. 50, r. 18, and Dan. Ch. Pr., 8th ed., p. 1494.

(i) *Re Edwards*, 31 L. R. Ir. 242.

(k) *Fletcher v. Dodd*, 1 Ves.

(g) *Harrison v. Boydell*, 6 Jr. 85.

Sim. 211.

(l) 8 Ves. 72, 73.

Chap. XI. between the time when the receiver's balance was paid in, and the time when it ought to have been paid in.

In *Hicks v. Hicks* (m), where a receiver had been appointed over an estate during the minority of an infant who had no guardian, and had been directed to place out the surplus rents and profits of the estate, when they should amount to a competent sum, with the approbation of the Master, on Government or other securities, but had omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of 4 per cent. on the surplus rents and profits from the date of the decree until the infant came of age, although the infant, two days after he came of age, settled accounts with the receiver, who delivered up his vouchers and gave him copies of all the accounts passed by the Master.

Accounts
of a
receiver
may be
reopened.

It has been held in Ireland that a receiver's accounts, which have been vouched before the examiner, can be reopened on the discovery of error in them, notwithstanding that the judge's certificate is attached (n).

Accounts
of receiver
appointed
in fore-
closure
action.

The mortgagor is entitled to credit for rents received by the receiver appointed in a foreclosure action during the period between the date of the Master's certificate and the day fixed for redemption. Where a receiver has been appointed an order for foreclosure *nisi* ought to provide that, in taking the account, the plaintiff should be charged with the amount (if any) paid into court by the receiver, and any sum in the receiver's hands at the date of the certificate, and with such a sum (if any) as the plaintiff shall submit to be charged with in respect of rents and profits come to the receiver's hands before foreclosure absolute (o). If this form is used the necessity

(m) 3 Atk. 276.

423.

(n) *Re Browne*, 19 L. R. Ir.

(o) *Simmons v. Blandy*, [1897]

for opening the foreclosure and ordering a fresh account Chap. XI. will be avoided. If more is in fact received than the plaintiff submitted to be charged with, a fresh account may be verified by affidavit and vouched without further order; but the plaintiff should be careful to submit to be charged with a sufficient sum to cover all rents and profits. If the balance due from the receiver, after deducting outgoings, is less than the amount with which the plaintiff submitted to be charged, the foreclosure is not opened, the receiver's account being taken at once (*p*).

If the order *nisi* is not made in the above form a fresh account will be directed and a further time, usually one month, given for redemption (*q*); though to save the expense of an account, the mortgagee was allowed to verify the amount due by affidavit after allowing for receipts down to the application (*r*). If rents were received after the date fixed for redemption, the foreclosure was not reopened, but an immediate order absolute made (*s*); and where the order *nisi* provided that plaintiff might apply for any moneys come to the hands of the receiver, who received rents after certificate, an order

1 Ch. 19; and for earlier forms of order, *Smith v. Pearman*, 36 W. R. 681; *Barber v. Jeckells* (1893), W. N. 91; *Cheston v. Wells*, [1893] 2 Ch. 151; *Christy v. Godwin*, 38 S. J. 10; *Lusk v. Sebright*, 71 L. T. 59; *Blaiberg v. Gatti*, 100 L. T. Jo. 441.

(*p*) So decided by Eady, J., in an unreported case; see also *Ellenor v. Ugle* (1895), W. N. 161.

(*q*) *Jenner-Fust v. Needham*,

32 Ch. D. 582; *Peat v. Nicholson*, 34 W. R. 451; but see *Welch v. National Cycle Works*, 35 W. R. 137.

(*r*) *Jenner-Fust v. Needham*, *supra*.

(*s*) *National Building Society v. Raper*, [1892] 1 Ch. 54, following *Constable v. Howick*, 5 Jur. N. S. 331, and not following *Ross Improvement Commissioners v. Usborne* (1890), W. N. 92,

Chap. XI. absolute was made without further account or extending the time (*t*).

In a case where a receiver appointed in a foreclosure action had brought in his final account, and the foreclosure had been made absolute, but it afterwards appeared that the receiver had omitted some rents from his account, it was held that, in the absence of any evidence that the plaintiff in the foreclosure action had received any of the rents which the receiver had not accounted for, there was no reason why the foreclosure should be opened, merely because the receiver, who was not the plaintiff's agent but an officer of the court, had made a mistake which was not discovered before it was too late (*u*).

Accounts
of deceased
receiver.

An order may be obtained, on summons at chambers, that the executors of a deceased receiver be at liberty to pass his accounts, and to lodge the balance in court (*x*). In a case where, on the executors' application, liberty had been given them to pass their accounts and to pay in the balance, they were not allowed, after the lapse of many years, to object to the order on the ground of want of assets (*y*).

The order cannot, however, be obtained without the consent of the executors. If the executors do not consent, the court has no jurisdiction to order, in a summary way, that they shall bring in and pass the deceased receiver's accounts, and pay the balance out of his assets (*z*). The

(*t*) *Coleman v. Llewellyn*, 34 Ch. D. 143. 15 Sim. 483; and, as to form of summons, see Dan. C. F. 928.

(*u*) *Ingham v. Sutherland*, 63 L. T. 614. (*y*) *Gurden v. Badcock*, 6 Beav. 157.

(*x*) For form of order see (*z*) *Jenkins v. Briant*, 7 Sim. Seton, 7th ed., p. 736; see, too, 171.

proper course to follow, if the recognisance cannot be put in suit, is to bring an action against the personal representatives or representative of the deceased receiver for an account (a). Chap. XI.

An admission by a receiver's executor of assets to answer what is due from his testator is sufficient to make the executor liable to pay such interest as the receiver's estate may be charged with in respect of the rents retained in his hands (b). But, if there has been laches of the parties, the executor will only be ordered to pay in the principal money and the costs of the application (c).

Where a receiver neglects to bring in his accounts, or, having brought them in, fails to pay the balance certified to be due from him within the time limited, and has been proceeded against for the contempt of court, the party prosecuting the contempt may put the recognisance in suit against the sureties. But he is not at liberty to sue the sureties until he has taken proceedings against the receiver for the contempt, unless the receiver has become bankrupt, or it can be shown that proceedings against him for contempt would be useless (d). Putting
recog-
nizance
in suit.

In practice, proceedings by *scire facias* on the receiver's recognisance are now rarely, if ever, resorted to: the sureties usually submit to the jurisdiction in the action, and the amount due from them is ascertained there (e). Moreover, in the majority of cases, a bond instead of a recognisance is accepted.

(a) *Ludgater v. Channell*, 15 157.
Sim. 482; 3 Mac. & G. 180.

(b) *Foster v. Foster*, 2 Bro. too, *Ludgater v. Channell*, 3
C. C. 615; *Tew v. Lord Winter-* Mac. & G. at p. 176, note (a).
ton, cit. 4 Ves. 606.

(c) See *Re Graham*, [1895]

(d) *Gurden v. Badcock*, 6 Beav. 1 Ch. 66.

Chap. XI. Where the receiver's recognisance is to be put in suit, an order must first be obtained to authorise the proceeding. This order is usually obtained on summons, which must be served personally on the receiver, or his representatives, and also upon the sureties, if they are to be proceeded against (*f*).

An order for leave to put the recognisance in suit having been obtained, the next step used to be to proceed by *scire facias*, in the names of the cognisees named in the recognisance, or the survivor of them, or the executors or administrators of the survivor (*g*), against the cognisors therein named, or any of them, or their respective heirs, executors, or administrators (*h*).

Upon the death of a receiver, the parties interested may come to the court either against his representatives, or against his sureties, and they should in the first place apply against both, in order to avoid the objection which, if either were omitted, the persons made respondents might raise to the absence of the persons omitted. The court, without deciding whether the representatives or the sureties are primarily liable, can make an order allowing the deceased receiver's recognisance to be enforced against his real and personal representatives and sureties (*i*).

It was laid down by Shadwell, V.-C., in *Ludgater v. Channell* (*k*), on the authority of the registrars, to be the then practice not to put the recognisance in suit against

(*f*) *Thurlow v. Thurlow*, 4 Jur. 982; Dan. Ch. Pr., 8th ed., p. 1495. As to form of summons, see Dan. Ch. Forms, 6th ed., 928; and, as to order in such case, see Seton, 7th ed., p. 772.

(*g*) Seton, 7th ed., p. 775.

(*h*) Dan. Ch. Pr., 8th ed., pp. 1495-7.

(*i*) *Ludgater v. Channell*, 3 Mac. & G. 175, 179-181.

(*k*) 15 Sim. 479.

the surety, in default of the receiver paying what was due Chap. XI. from him, without the amount being first ascertained, except where the receiver had absconded; and that a breach of the recognisance by non-payment of the balance reported due from the receiver ought to be shown, as a ground for granting an application for liberty to put the recognisance in suit; but Lord Truro, before whom the case came, on appeal from the Vice-Chancellor, in the year 1851, thought that the recognisance might, in the case of a deceased receiver, be enforced against the surety without ascertaining the amount due, where there was no means of ascertaining or enforcing the claim. The case of an absconding receiver, as put by the registrars, he regarded as only an example of an exceptional case in which it was difficult to ascertain the amount due (l).

A certificate of the Master, stating the result of a receiver's account, is enjoined by the Rules of the Supreme Court (m) to be taken from time to time (n). Result of receiver's account to be certified.

A receiver appointed of the property of a company under the powers of any instrument must every half-year and upon ceasing to act file with the registrar of companies an abstract of his accounts (o). Accounts of receiver appointed by debenture holders to be filed.

- (l) *Ludgater v. Channell*, 3 No. 1767.
 Mac. & G. 180. (o) Companies (Consolidation)
 (m) R. S. C. Ord. 50, r. 22. Act, 1908, s. 95.
 (n) Form, Dan. C. F., 6th ed.,

CHAPTER XII.

DISCHARGE OF A RECEIVER.

Chap. XII. UNLESS the minutes of the order appointing or continuing a receiver, or a receiver and manager, contain a provision for his discharge (a), an application to the court is generally necessary, in order to divest his possession (b). The appointment of a receiver made previously to the judgment in an action will not be superseded by it, unless the receiver is appointed only until judgment or further order (c). But an order to put a purchaser into possession is in itself a discharge of a previous order for a receiver as to the lands mentioned in the subsequent order (d). And where the estate over which a receiver has been appointed expires, the reversioner or remainderman need not apply to have the receiver discharged; for in such a case, the legal estate vesting in possession, and there being an indisputable right to enter, it is not necessary that there should be an order discharging the receiver (e).

Discharge of receiver on his own application. As a general rule, where a receiver has been appointed and has given security, he will not be discharged upon his own application, without showing some reasonable cause why he should put the parties to the expense of a

(a) *Day v. Sykes, Walkers & Co.*, 55 L. T. 763; (1886), W. N. 209.

(b) *Thomas v. Brigstocke*, 4 Russ. 64.

(c) See *ante*, p. 181.

(d) *Ponsonby v. Ponsonby*, 1 Hog. 321; *Anon.*, 2 Ir. Eq. 416.

(e) *Re Stack*, 13 Ir. Ch. 213.

change (*f*). If, however, he can show reasonable cause Chap. XII. for his discharge, he may be discharged, and allowed to deduct the costs of and incidental to the application for discharge out of any balance in his hands (*g*). Infirmity preventing the receiver from properly performing his duties, and ill health increased by the anxieties of the duties of his office, afford sufficient excuses for his discharge (*h*).

A receiver who wishes to be discharged, and cannot show any reasonable cause for putting the parties to the expense of a change, will, as a rule, be discharged at his own request only, if at all, on the terms of his paying the costs of the appointment of another receiver and consequent thereon. But in one case, in which a receiver had acted for many years and had paid in his balance, the court did not charge him with the costs of his removal and the appointment of another receiver (*i*).

A receiver ought not to make an application for discharge to come on with the further consideration of the action; for the court can, on the further consideration, discharge him without such an application. Accordingly, the costs of a separate application for discharge will be refused (*k*).

A receiver is generally continued until judgment in the action in which he has been appointed; but, if the right of the plaintiff ceases before that time, the receiver may be discharged at once, and cannot be continued at the instance of a defendant (*l*). Accordingly, in a case in

Discharge
of receiver
on satis-
faction of
incum-
brance.

(*f*) *Smith v. Vaughan*, Ridg. Eq. 356.
temp. Hard. 251.

(*g*) *Richardson v. Ward*, 6 L. J. Ch. 356.
Madd. 266.

(*h*) *Ib.*

(*i*) *Davis v. Duke of Marlborough*, 2 Sw. 167, 168.

(*j*) *Cox v. Macnamara*, 11 Ir.

Chap. XII. which a receiver had been appointed at the suit of an annuitant, and the plaintiff had been satisfied by the payment of his demand, Lord Eldon held that the order for a receiver must be discharged, although the discharge was opposed by two creditors having annuities prior to the plaintiff's annuity. "With the right of the plaintiff to have a receiver," he said, "must fall the rights of the other parties. It would be most extraordinary, if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf" (m). In other cases, however, of a somewhat similar character, proceedings have been stayed without prejudice to the order appointing a receiver (n).

Discharge
of receiver
on his con-
tinuance
becoming
unneces-
sary.

If, in the course of the proceedings, the continuance of a receiver becomes unnecessary, he will be discharged. Thus, in a case where a receiver had been appointed in consequence of the misconduct and incapacity of trustees under a will, he was ordered to be discharged on the appointment of new trustees, who undertook to account half-yearly in the same way as a receiver, and agreed to act without a salary (o). So, where a receiver, who had been appointed in consequence of the executors of a testator's will having refused to act, quitted his place of residence in the vicinity of the estates over which he had been appointed receiver, the court, on the consent of the other parties to the cause, and the executors expressing

(m) *Davis v. Duke of Marlborough*, 2 Sw. at p. 168; and see *Sankey v. O'Maley*, 2 Moll. 491; but see 2 Sw. 118; *Largan v. Bowen*, 1 Sch. & Lef. 296; *Murrough v. French*, 2 Moll. 498.

(n) *Damer v. Lord Portarlington*, 2 Ph. 34; *Paynter v. Carew*,

18 Jur. 419; *Murrough v. French*, 2 Moll. 498.

(o) *Bainbrigge v. Blair*, 3 Beav. 421, 423. *Secus*, if on the appointment of new trustees, there are questions still outstanding: *Reeves v. Neville*, 10 W. R. 335.

their willingness to act, made an order that the receiver Chap. XII. should pass his accounts (*p*). So, also, where a receiver had been appointed at the suit of an annuitant, he was discharged on payment of the arrears of the annuity, there being no reason, under the circumstances of the case, why he should be continued (*q*). And in another case a receiver was discharged, when the object of his appointment had been fully effected (*r*).

A receiver is liable to be discharged for irregularity in carrying in his accounts, for conduct making it necessary to take proceedings to compel him to do so, and for so passing his accounts that the amount of the balance in his hands cannot be ascertained (*s*). Again, a receiver may be removed, if his conduct has been such as to impede the impartial course of justice (*t*), or to amount to a gross dereliction of duty (*u*), or if his appointment as a receiver has been improper (*x*).

Other causes for discharging a receiver.

It is conceived, however, that a charge of misbehaviour against a receiver, for suffering the owner of an estate over which the receiver was appointed to remain in part possession of it to the prejudice of the estate, will not be regarded by the court as a sufficient reason for discharging the receiver; for in such a case the parties themselves have caused the loss, by not compelling the owner by the

(*p*) *Davy v. Gronow*, 14 L. J. Ch. 134.

(*q*) *Braham v. Lord Strathmore*, 8 Jur. 567.

(*r*) *Tewart v. Lawson*, L. R. 18 Eq. 490; see, too, *Hoskins v. Campbell* (1869), W. N. 59.

(*s*) *Bertie v. Lord Abingdon*, 8 Beav. 53.

(*t*) *Mitchell v. Condry* (1873), W. N. 232.

(*u*) *Re St. George's Estate*, 19 L. R. Ir. 566.

(*x*) *Re Lloyd*, 12 Ch. D. 448; *Nieman v. Nieman*, 43 Ch. D. 198; *Re Wells*, 45 Ch. D. 569; *Brenan v. Morrissey*, 26 L. R. Ir.

618.

Chap. XII. authority of the court to deliver up possession to the receiver (y).

Where a receiver becomes bankrupt, he will be discharged, and another receiver will be appointed (z).

If a receiver has been wrongly appointed over property belonging to a person who is not a party to the action, he will be discharged, even though there has been an abatement of the action by the death of a sole defendant (a).

The court will discharge a receiver upon the application of a prior mortgagee demanding to go into possession as such by himself or his receiver (b).

In one case, in which a receiver had been appointed in an administration suit, another person, who was willing to act at a lower salary, was ordered to be substituted for him, as receiver, on the application of a mortgagee of a tenant for life of the property (c).

Discharge of receiver over estate of infant. In the case of an infant, it is not right to vacate the recognisance of a receiver appointed on behalf of the infant immediately upon his coming of age and the receiver passing his accounts; for defalcations are sometimes found after a great length of time; and, if it were proved long after the coming of age that the receiver had not accounted for what he had received, the money might be recovered under the recognisance, if it had not been vacated (d). Lord Kenyon held that a receiver ought not to have his recognisance discharged until after the expiration of a year from the infant's attainment of the

(y) *Griffith v. Griffith*, 2 Ves. 400. *mated Estates*, [1912] 2 Ch. 497; ante, p. 189.

(z) Dan. Ch. Pr., 7th ed., p. 1479. (c) *Stanley v. Coulthurst* (1868), W. N. 305.

(a) *Lavender v. Lavender*, Ir. R. 9 Eq. 593. (d) *Anon.*, cited 2 Madd. Ch. Pr., 2nd ed., p. 244.

(b) *Re Metropolitan Amalga-*

age of twenty-one years, and Lord Eldon approved of Chap. XII. that rule (e).

Where estates over which a receiver has been appointed have been ordered to be sold, the receiver will be continued until the conveyances are executed under the order, in order that he may collect any arrears of rent. In *Quinn v. Holland* (f) a party refused to execute a conveyance, on the ground that arrears of rent were due, and that by executing the conveyance he would extinguish his remedy ; and thereupon the court directed the receiver to be continued in regard to those rents down to the day of executing the conveyance, and directed that the tenants should be compelled to pay their arrears to the receiver according to the course of the court.

The receiver of an estate will not be discharged until he has received from the parties interested in the estate any balance found due to him on passing his accounts (g). In administration actions a receiver may be discharged on passing his accounts, and be paid his remuneration and costs, without waiting to see whether the estate is sufficient to pay all costs payable out of it (h).

A receiver being appointed for the benefit of all the parties interested, he will not be discharged on the application of that party only at whose instance he was appointed (i) ; nor, where a receiver has been appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one (k).

(e) *Ib.*

(f) *Ridg. temp. Hard.* 295.

(g) *Bertrand v. Davies*, 31 Beav. 436; *infra*, p. 352.

(h) *Batten v. Wedgwood, &c.*, Co., 28 Ch. D. 317.

(i) *Davis v. Duke of Marlborough*, 2 S. W. 118; *Bainbrigge v. Blair*, 3 Beav. 421, 423.

(k) *Smith v. Lyster*, 4 Beav. 227, 229.

Discharge of receiver of estates decreed to be sold.

Receiver not discharged until balance due to him on his accounts paid.

Receiver not discharged on application of one party only.

Chap. XII. The application to discharge a receiver appointed in an action should be made as a rule by summons (*m*); the direction for his discharge may be given in the judgment at the trial, or in the order upon further consideration (*n*). In the King's Bench Division the application for a discharge is made to a judge in chambers by summons.

Mode of application to discharge a receiver (*l*). A summons, notice of motion, or petition, for the discharge of a receiver, should be served on all the parties (*o*). The service of it on the receiver should be personal, and such service will not be dispensed with unless an order for substituted service is obtained (*p*). But a receiver, though served, is not entitled to appear at the hearing of the application, unless some personal charge is made against him. If he appears, he will not be allowed the costs of his appearance (*q*), except under special circumstances (*r*).

Apparance. If the receiver has not passed his final account and paid over any balance found due from him, the order discharging him directs him to do so; and, if he has given a recognisance, it directs the recognisance to be vacated on his passing his final account, and lodging in court any balance which may be certified to be due from him (*s*). An office copy of the recognisance, if any, is, in the chambers of some of the judges of the Chancery

(*l*) As to practice in Lunacy, see Rules in Lunacy, 1893, r. 9.

(*m*) Form of summons, Dan. C. F. 929; forms of order, Seton, 781; also Palmer, Vol. III., Chap. 79.

(*n*) Seton, 7th ed., pp. 781, 782.

(*o*) Dan. Ch. Pr., 8th ed., p. 1499.

(*p*) *Att.-Gen. v. Haberdashers'*

Company, 2 Jur. 915.

(*q*) *Herman v. Dunbar*, 23 Beav. 312; and see p. 325.

(*r*) *General Share Co. v. Welley Brick Co.*, 20 Ch. D. 260, 267.

(*s*) Seton, 7th ed., p. 781; Dan. Ch. Pr., 8th ed., p. 1499. As to form of summons to vacate recognisance, see Dan. Ch. Forms, 6th ed., 929.

Division, required to be procured from the Filing Department of the Central Office, and left at the time of bespeaking the order. The practice is, however, not uniform in this respect. Chap. XII.

The practice on vacating bonds and recognisances is as follows: the original or duplicate order to vacate the recognisance or bond is produced to the proper officer at the Filing Department, and the vacating note is stamped on the recognisance or bond, and the order, which are returned to the solicitor on his receipt for the same: a copy of the order must be filed. If the order to vacate is conditional on the performance of some act by the receiver, or is contingent on any event, it must first be produced to the Master or registrar, who on being satisfied that the condition has been fulfilled will endorse on it a direction that the bond or recognisance or undertaking may be vacated, pursuant to the terms of the order (t).

The order is then produced at the Filing, &c., Department of the Central Office (Room 84), where the bond, recognisance or undertaking will be endorsed with the vacating note, verified by seal and delivered out to the solicitor on his receipt. Recognisances and bonds no longer being enrolled (u), the latter part of Ord. 60, r. 4, requiring the proper officer to attend the master for the vacating of the recognisance by the latter, is obsolete; but if the bond or recognisance was enrolled prior to 1st June, 1909, the order endorsed as above must be produced at the Public Record Office, when the security will be marked Vacated. The fee of 10 shillings for

Vacating
recog-
nisances.

(t) See Annual Practice, nn. to . signature.
Ord. 61, r. 8A. The vacating (u) See Ord. 61, r. 8A.
note does not require the Master's

Chap.XII. vacating a bond or recognisance is impressed on the order ; no fee is payable on vacating an undertaking.

In an Irish case, in which a receiver was discharged owing to gross dereliction of duty, the order discharging him disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of the appointment of his successor (x).

Receiver
appointed
by debenture
holders
ceasing
to act.

A receiver of the property of a company appointed under the powers of any instrument who has entered into possession must, on ceasing to act, file with the Registrar of Companies notice to that effect and an abstract of his accounts (y).

(x) *Re St. George's Estate*, 19
L. R. Ir. 566.

(y) Companies (Cons.) Act,
1908, s. 95.

CHAPTER XIII.

LIABILITIES AND RIGHTS OF SURETIES.

THE sureties for a receiver will not be discharged at their own request. Where, therefore, an application was made to discharge a receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held that no regard was to be had to their application, unless it was for the benefit of the estate, or unless there were special circumstances in the case (*a*) ; as, for instance, where underhand practice can be proved, and the person secured by the recognisance can be shown to have been connected with such practice (*b*). In *Swain v. Smith* (*c*) a surety was discharged on his own application, where he had become surety in violation of his partnership articles.

Chap.
XIII.
Discharge
of sureties.

Where a surety procures his discharge during the continuance of the receivership, the receiver must enter into a fresh recognisance with new sureties (*d*).

On discharge of surety fresh recognisance is necessary.
Death, &c., of surety.

Where one of the sureties of a receiver dies, leaving real property bound by his recognisance, his death is no ground for requiring the receiver to procure a new surety. But where it appeared that the deceased surety had not

(*a*) *Griffith v. Griffith*, 2 Ves. Moll. 407, per Lord Manners, Sen. 400 ; as to application by L.C.

a surety for his discharge, see (*c*) Seton, 7th ed., p. 775.

O'Keefe v. Armstrong, 2 Ir. Ch. (*d*) *Vaughan v. Vaughan*, 1 Dick. 90 ; *Blois v. Betts*, ib.

115.
(*b*) *Hamilton v. Brewster*, 2 336.

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left any property which could be made available for the purpose of satisfying the recognisance, the court directed a new surety to be appointed (*e*).

Where one of the sureties dies, or goes abroad, and the receiver is unable to procure another surety, it is not the practice to charge the receiver with the expense of his discharge, or of the appointment of a new receiver (*f*).

When a surety becomes bankrupt, the receiver is usually required to enter into a fresh recognisance with two or more sureties. The order is made on summons (*g*).

The amount of security for which the surety is liable may be reduced in a proper case ; for example, where part of the assets have been got in and disposed of (*h*).

Order on
discharge
of surety.

In *Shuff v. Holdaway* (*i*), an order was made on the application of a surety, directing the receiver's accounts down to that time to be passed, and that, on payment into court by the receiver, or by the applicant, of the certified balance (not exceeding the penalty), the applicant should be discharged as surety, and should be at liberty to apply to have the recognisance vacated as to him, and that the applicant should be at liberty to attend the taking of the accounts ; but he was ordered to pay the costs of the application.

Surety
allowed to
attend
passing of
accounts
of bank-
rupt re-
ceiver.

A surety is not entitled without leave to attend at the taking of a receiver's account except at his own expense (*k*), but leave will be given in a proper case, as, for instance,

(*e*) *Averall v. Wade*, Fl. & K. 341.

(*f*) *Lane v. Townsend*, 2 Ir. Ch. 120.

(*g*) Dan. Ch. Pr., 8th ed., p. 1500. As to form of summons, see Dan. C. F., 6th ed., 930.

(*h*) Form of summons, Dan. C. F. 930.

(*i*) 3rd September, 1857, cited in Dan. Ch. Pr., 8th ed., p. 1500 ; see, too, *O'Keefe v. Armstrong*, 2 Ir. Ch. 115.

(*k*) *Re Birmingham Brewery Co.*, 31 W. R. 415.

where the sureties were likely to be called on to pay a balance (l) ; and where a receiver had died in insolvent circumstances, and his personal representative had consented to his final account being taken in the suit to which he was appointed, liberty to attend was given to the personal representative (m).

The surety is answerable, to the extent of the amount of the bond or recognisance, for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for to the estate which is being administered, including the costs of his removal, and of the appointment of a new receiver in his place (n). This statement of the law was approved in *Re Graham*, *Graham v. Noakes* (o), by Chitty, J., from whose judgment it may, it is conceived, be concluded that, in ascertaining the liability of sureties under a receiver's recognisance, the court proceeds on the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into court or to account for. Consequently, where a receiver of "rents and profits" of real estate had (1) insured some of the farm buildings in his own name and received and misapplied the insurance money, had (2) received and not accounted for dividends on consols in court representing proceeds of sale of real estate, and had (3) received under an order of the court money representing personal estate to be spent in repairs,

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XIII.

Extent of
liability of
surety.

(l) *Dawson v. Raynes*, 2 Russ. 467. As to form of summons by surety to attend the passing of a receiver's accounts, see Dan. C. F., 6th ed., 931.

(m) *Simmons v. Rose*, 20th November, 1860, cited in Dan.

Ch. Pr., 8th ed., p. 1501.

(n) *Maunsell v. Egan*, 3 J. & L. 251 ; *Re MacDonaghs*, Ir. R. 10 Eq. 269 ; *Smart v. Flood*, 49 L. T. 467. Comp. *Watters v. Watters*, 11 Ir. Eq. 336.

(o) [1895] 1 Ch. 66, at p. 70.

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which money he had misappropriated, it was held that the sureties had been properly charged in respect of those three items (*p*). In a case, however, where a receiver had been bankrupt with the knowledge of all parties for a considerable time, during which no steps were taken to compel the passing of his accounts, the surety was excused from payment of interest (*q*). On taking a defaulting receiver's account, the court does not necessarily exact from his surety the full amount of the sum mentioned in the recognisance (*r*).

The liability of the surety under the ordinary bond is to make good the net loss, caused by the receiver's default, to the estate which is being administered, not to third persons: where, therefore, a receiver and manager had properly incurred, and was entitled to be indemnified against, trade liabilities to the extent of £900, but was in default to the estate to the extent of £400, it was held that, inasmuch as the trade creditors could only claim against the estate to the net amount of the receiver's indemnity, *i.e.*, £500, the estate had suffered no loss by reason of the receiver's default, and that, consequently, the sureties could not be called upon to pay the £400 (*s*).

Inasmuch as a committee or receiver of the estate of a lunatic is not accountable in the lunacy in his character of committee or receiver for rents and profits received

(*p*) *Re Graham, Graham v. Noakes*, [1895] 1 Ch. 66.

(*q*) *Dawson v. Raynes*, 2 Russ. 466; see, too, *Re Herricks*, 3 Ir. Ch. 187.

(*r*) *Per Chitty, J.*, in *Re Graham, Graham v. Noakes*, [1895] 1 Ch. at p. 70.

(*s*) *Re British Power, &c., Co.*,

[1910] 2 Ch. 470; in the earlier case of *Re London United Breweries*, [1907] 2 Ch. 511, the sureties had paid the amount by which the receiver was in default without contesting their liability. See further as to these cases, p. 302.

after the death of the lunatic, his surety cannot be made liable in respect of the receiver's default as to such rents and profits (*t*). Chap. XIII.

If a surety has been called on to pay anything on account of the receiver, he is entitled to be indemnified for what he has so paid out of any balance which may be coming to the receiver in the action. Therefore, where a receiver had borrowed money from his surety for the purpose of making sundry necessary payments, it was held that the surety was entitled to be repaid the amount which he had lent to the receiver out of a balance in court due to the receiver (*u*). Upon the same principle, some shares belonging to a receiver in property which was being administered by the court were held liable to make good to his sureties a sum of money which they had been obliged to pay in consequence of his default, although those shares were not included in a security which the receiver had given to the sureties by way of indemnity (*x*). Indemnity of surety.

A surety who pays the debt of his principal has the same right against his co-surety as he has against the principal, and he will be permitted to put the recognisance in suit as against his co-surety or to claim contribution (*y*). Right of surety against co-surety.

Where an action is brought against a surety upon the bond, the proper course for him to pursue is conceived to be to apply to the court by motion or summons, with notice to the parties interested, in the action to which the receiver was appointed, to stay the proceedings on the bond, offering at the same time to lodge what is due Course for surety to pursue when action is brought against him on bond.

(*t*) *Re Walker*, [1907] 2 Ch. 120; and see *Re Bennett*, [1913] 2 Ch. 313. (*x*) *Brandon v. Brandon*, 3 D. & J. 524, at pp. 530, 531.

(*y*) *Re Swan's Estate*, Ir. R. 4 Eq. 209.

(*u*) *Glossup v. Harrison*, 3 V. & B. 134; Coop. 61.

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from the receiver, to an amount not exceeding the penalty, in court (z). The surety must pay the costs of his application, and of the proceedings in consequence of it (a). If the receiver's account has not been taken, the application should also ask for an inquiry as to what is due from the receiver. The court may, it is conceived, upon an application of this kind, indulge the surety by allowing him to pay the balance due from the receiver by instalments (b).

Sureties
should not
pay to the
solicitor
of the
plaintiff.

Payment by a surety to the solicitor prosecuting the proceedings is insufficient. In a case where a surety, being sued upon his recognisance, paid the amount to the solicitor prosecuting the proceedings and then applied to have his recognisance vacated, and served the petition on the plaintiff, who did not appear, the court declined to order the recognisance to be vacated at once, but directed the plaintiff to be served with notice that an order vacating the recognisance would be made on a certain day, unless he should show cause to the contrary (c).

The practice on vacating the bond or recognisance is dealt with in the previous chapter (d).

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| (z) <i>Walker v. Wild</i> , 1 Madd. 528. | |
| 528; <i>Re Graham, Graham v. Noakes</i> , [1895] 1 Ch. 66, at p. 70; Dan. Ch. Pr., 8th ed., p. 1501. | (b) <i>Ib.</i> |
| | (c) <i>Mann v. Stennett</i> , 8 Beav. 189. |
| | (d) <i>Ante</i> , p. 353. |
| (a) <i>Walker v. Wild</i> , 1 Madd. | |

CHAPTER XIV.

APPOINTMENT OF A RECEIVER OUT OF COURT.

THERE are many cases in which the appointment of a receiver, or a receiver and manager, can be, and is, effected without resort to the court. Sometimes such an appointment is made by agreement between persons who are *sui juris*, as part of some transaction or arrangement between them; as, for instance, where partners appoint a receiver and manager to wind up the partnership business (a), or where, to secure the repayment by weekly instalments of an advance of money made by the trustees of a loan society to a small trader, he mortgages to them his shop, with the goodwill and takings of his business, and, with the concurrence of the lenders, appoints his cashier to be receiver of the takings, it being agreed that the receiver shall, out of the moneys received by him, pay the monthly instalments, and any rent, rates, taxes, premiums of insurance, expenses of repairs, or other sums of money which may have to be paid in order duly to maintain the security (b). More commonly, however, the appointment is made by virtue and in exercise of a power for the purpose, either expressed in an antecedent

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When
receiver
appointed
out of
court.

(a) In such a case the receiver is entitled to remuneration, on a *quantum meruit*, *prima facie* on the same scale as receivers appointed by the court: *Prior v. Bagster* (1887), W. N. 194.

(b) A form of mortgage applicable to a case of this kind is given in Key & Elphinstone's *Precedents*, 10th ed., vol. 2, at p. 93.

Chap. mortgage deed (c), debenture, debenture trust deed, or
XIV. other instrument, or conferred by statute.

Who may In exercising the power of appointing a receiver the
be ap- mortgagee is in a fiduciary relation to the mortgagor :
pointed. he must not therefore appoint himself ; and if he does
so, or if one of several mortgagees appoint one of them-
selves, the person appointed will not be allowed remunera-
tion for his services (d). Where, however, the mortgagee
is a company there is no such fiduciary relation between
its directors and the mortgagor as to disentitle one of such
directors to remuneration for his services as receiver (e).

Appoint- Independently of statute law or contract, a mortgagee
ment by in possession of real property may of his own authority,
mortgagee if the distance or nature of the property be such as would
independ- require from him much time and trouble were he personally
ently of to collect the rents, appoint a receiver of them, and
statute allow and charge a reasonable remuneration for the
law. receiver's services. But a receiver so appointed is the
agent of the mortgagee only ; and his possession also is

(c) *E.g., Houldsworth v. York-shire, &c., Association*, [1903] 2 Ch. 284, at p. 287, *affd s. n. Illingworth v. Houldsworth*, [1904] A. C. 355, where the mortgagee of a company's present and future book-debts appointed a receiver, but the mortgage was held to be a "floating charge," and void for want of registration.

(d) *Nicholson v. Tutin*, 3 K. & J. 159.

(e) *Per Cozens-Hardy, M.R., and Buckley, L.J., in Bath v. Standard Land Co.*, [1911] 1 Ch. pp. 626, 646, disapproving *Kava-*

nagh v. Workingman's Benefit Building Society, [1896] 1 Ir. R. 56. It was held that a company which had entered into an agreement to manage and develop certain estates was not liable to account to the mortgagor for remuneration paid to directors for work done in their professional capacities, *e.g.*, as solicitor, &c., in connection with the estates ; *secus*, in respect of remuneration for work which the company was bound to do under the agreement, such as keeping accounts.

that of the mortgagee, who is chargeable with equal strictness, whether he receives the rents personally or through his agent (*f*). Chap.
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With the object of obtaining, under a mortgage of freeholds, copyholds, or leaseholds, the advantages, without the responsibilities, of possession, and especially of providing for the regular payment of the interest on the mortgage debt, the mortgagee sometimes stipulates for the appointment, at the time of the execution of the mortgage, of a receiver. In such a case the appointment may be made either in and by the mortgage deed, or by a separate deed (*g*); and the latter course has this advantage, that the deed can conveniently be delivered to the receiver, for production to the tenants as an authority for the payment of their rents to him. The appointment is expressed to be made by the mortgagor with the concurrence of the mortgagee, and the person appointed is expressly made the agent and attorney of the mortgagor, in his name to receive, and if necessary, to recover the rents of the tenants, with power to give receipts and make allowances; provisions are made for the manner and order of the application of the rents by the receiver, including the retention of his agreed remuneration, and for the appointment, if necessary, of a new receiver, and the mortgagor covenants with the mortgagee not to revoke the appointment or obstruct the receiver; but usually, it is also provided that the receiver is not to act until some interest is in arrear, or some other specified default on the part of the borrower, or event, has occurred (*h*).

(*f*) Davidson's Precedents, 3rd ed., vol. 2, p. 641; *Leith v. Irvine*, 1 M. & K. 277, at p. 286. made by deed, but may be made by writing not under seal.

(*g*) The appointment is usually made by deed, but may be made by writing not under seal. (*h*) A full form of such an appointment is given in Key

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Where the appointment is made in this way, the receiver is to be regarded and treated as being for all purposes the agent of the mortgagor, although it is the mortgagee who in fact nominates the receiver (i).

In *Cradock v. Scottish Provident Institution* (k), the tenant for life of a landed estate covenanted, on the marriage of his daughter, to pay her an annuity, and in and by the same deed, after reciting that, in order to secure the payment of the annuity, it had been agreed that a receiver should be appointed, the covenantor appointed a receiver of the rents of the estate, and directed the tenants to pay their rents to him; and the deed went on to direct that all rents received should be applied in payment, firstly, of outgoings, and, secondly, of the annuity. It was held that the deed created an equitable charge on the life estate, which had priority over a subsequent incumbrance on it, taken with notice of the deed.

Lord
Cran-
worth's
Act.

By Lord Cranworth's Act (23 & 24 Vict. c. 145), which was passed in the year 1860, every mortgagee by deed of "hereditaments of any tenure, or any interest therein," was empowered (unless the powers conferred by the Act were negatived or varied by express declaration in the deed) to appoint or obtain the appointment of a receiver

& Elphinstone's Precedents, 10th ed., vol. 2, at p. 81; see, too, Davidson's Precedents, 3rd ed., vol. 2, pp. 642, 648. The device of a demise of mortgaged lands by mortgagor and mortgagee to the receiver for a term of years, so as to give him the legal estate, thereby enabling him to distrain upon the tenants in his own

name, has occasionally been adopted, but it is not to be recommended generally: *ib.* at p. 649.

(i) *Jefferys v. Dixon*, L. R. 1 Ch. 183, at p. 190; *Law v. Glen*, L. R. 2 Ch. 634, at p. 640.

(k) (1893), W. N. 146; affirmed in C. A. (1894), W. N. 88.

of the rents of the mortgaged property in certain specified events; and the Act went on to provide that a receiver so appointed should be deemed the agent of the mortgagor, to define the receiver's powers and duties, and to provide for his remuneration, removal, and so on (sections 11-24 and section 32). The sections of the Act of 1860 conferring the foregoing powers were repealed by section 71 of the Conveyancing Act of 1881 (44 & 45 Vict. c. 41); but the repealing section is so worded as to preserve the right of appointing a receiver in the case of mortgages executed before the year 1882 (*l*).

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Since the coming into operation of the Conveyancing Act of 1881, mortgagees by deed have usually been content to rely on the provisions with respect to receivers contained in that Act, either without any modification of these provisions, or with such modifications of them as may be appropriate to the circumstances of the particular instrument and transaction.

Convey-
ancing Act
of 1881.

By the 19th section of the Act of 1881 it is enacted as follows:—

Section 19
of Act of
1881.

“ A mortgagee, where the mortgage is made by deed (*m*), shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):—

“ (1.) * * * * (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property or of any part thereof.

“ (2.) The provisions of this Act relating to the foregoing

(*l*) See *Re Solomon and Meagher's Contract*, 40 Ch. D. 508, at p. 511.

(*m*) The statutory powers, therefore, do not apply to a

mortgage by deposit not accompanied by a memorandum under seal, or to a mortgage of copyholds effected by conditional surrender only.

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powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the same manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

“(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

“(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.”

Interpre-
tation of
“mort-
gage,” &c.

It is to be borne in mind, in construing the section just quoted, and also the section which is about to be quoted in the next paragraph, that, in the Act of 1881, (section 2 (vi.)), “mortgage includes any charge on any property for securing money or money’s worth; and mortgage money means money, or money’s worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee.”

Section 24
of Act of
1881.

It is further enacted, by the 24th section of the Act of 1881, as follows:—

“(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act, shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

“(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver’s acts or defaults, unless the mortgage deed otherwise provides.

“(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same.

“(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

“(5.) The receiver may be removed, and a new receiver may be appointed, from time to time, by the mortgagee by writing under his hand (n).

“(6.) The receiver shall be entitled to retain, out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.

“(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage,

(n) See *Croghan v. Maffett*, 26 L. R. Ir. 671.

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whether affixed to the freehold or not, being of an insurable nature.

“(8.) The receiver shall apply all money received by him as follows, (namely) :

“(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property ; and

“(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ; and

“(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed, or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ; and

“(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage ; “and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property (o), or who is otherwise entitled to that property.”

Observations on sections 19 and 24 of Act of 1881.

In connection with the above 19th and 24th sections there are several points to be noticed.

(o) *I.e., primâ facie* the mortgagor: see *White v. Metcalf*, [1903] 2 Ch. p. 572 ; *Turner v. Walsh*, [1909] 2 K. B. p. 496. It is suggested that a mortgagee may direct payment to himself of the balance in reduction of principal, but that this would amount to entering into possession. A mortgagee must pay any balance after satisfaction

of his claim to the person entitled to receive it, *i.e.*, the second mortgagee, if there is one ; he cannot set up the Statute of Limitations, and claim to pay the second mortgagee only six years of interest, on behalf of a third mortgagee, though such third mortgagee is himself: *Re Thomson's Mortgage Trusts*, [1920] 1 Ch. 508.

Inasmuch as, by the terms of the Act, the statutory power of appointing a receiver does not arise until the mortgage money has become due, nor even then, unless the mortgagee has become entitled to exercise the power of sale conferred by the Act, express provision for the appointment of a receiver must be made in a mortgage deed, in case it is desired by the mortgagee to have power to appoint a receiver before the mortgage money has become due, or at a time when the statutory power of sale would not be exercisable. Where the Act alone is relied upon, it is a condition precedent to the exercise of the statutory power of appointing a receiver that there be, under the particular mortgage deed, a statutory power of sale which is presently exercisable (*p*).

The mere fact that a receiver of rents has been appointed by a mortgagee under the statutory power does not prevent the mortgagee, at all events if the receiver has not received anything, from bringing an action against the mortgagor, with the writ specially endorsed under R. S. C. Ord. 3, r. 6, for the principal and interest due under his covenants in the mortgage deed, and applying for summary judgment under R. S. C. Ord. 14; but if, on such an application, it appears that there is a real question as to the amount due, leave to defend will be granted (*q*).

(*p*) The events in which a mortgagee will, according to the terms of the Act, become entitled to exercise the statutory power of sale are set forth in s. 20 of the Act; but the provisions of that section may be varied in any case by agreement between the parties (s. 19 (2)), quoted *supra*, p. 365; and

K.R.

where, for instance, mortgage money is to be repayable by instalments, the deed should make the power of sale exercisable upon default in payment of any instalment. See Key & Elphinstone's Precedents, 10th ed., p. 56.

(*q*) *Lynde v. Waithman*, [1895] 2 Q. B. 180, at pp. 184, 188;

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Payment
of debts,
and for
repairs.

The mode of application directed by section 24 (8) imposes on the receiver a duty to the mortgagor, the mortgagee and puisne incumbrancers, if any; and this mode of application may be varied adversely to any of these persons with his consent (*r*); thus, where a receiver with the implied consent of the mortgagee had applied money in his hands in reducing principal instead of keeping down interest, the mortgagee was not allowed to object to this application as illegal (*s*). Where no power is given to the receiver to act otherwise than in accordance with the provisions of section 24, he would not be justified in paying an unsecured debt of the mortgagor not affecting the mortgaged property (*t*). And so, as regards repairs (cf. sub-section 8 (*i*)), he could not justify any expenditure except in respect of necessary or proper repairs, paid for out of the income of the mortgaged property on the express direction of the mortgagor, except as against the latter (*u*). But where the mortgage deed authorised the mortgagee to appoint a receiver with enlarged powers, including a power to carry on a business, it was held that a receiver appointed with such specific powers had authority to go on paying the instalments of a trade debt of the mortgagor, with the result of raising an implied promise to pay the balance of the debt out of the mortgagor's assets, which promise prevented the debt from becoming statute-barred. The death of the mortgagor did not affect the mortgagee's power of appointing

explaining *Earl Poulett v. Viscount Hill*, [1893] 1 Ch. 277.

(*r*) *Yourrel v. Hibernian Bank*, *infra*, q.v. as to evidence from which consent may be inferred.

(*s*) *Yourrel v. Hibernian Bank, Ltd.*, [1918] A. C. 372.

(*t*) See *Re Hale, Lilley v. Foad*, [1899] 2 Ch. 107, at pp. 117, 119.

(*u*) *White v. Metcalf*, [1903] 2 Ch. 567, at p. 573, in which case the position of a receiver under the Act was discussed at some length.

a receiver, and the receiver, when appointed, had power on behalf of his principal (*x*), the executrix of the original mortgagor, to pay the instalments in the same manner, and with the same legal results, as if they had been paid by the executrix herself (*y*). Chap.
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The receiver cannot pay arrears of interest which are statute-barred, neither can the mortgagee do so out of money paid him by the receiver (*z*).

It follows from the provisions of sub-section (2) of the 24th section of the Act that, if a statutory receiver, having got money into his hands, pays it away improperly to the mortgagor or otherwise than in accordance with the instrument of appointment, the mortgagee who appointed him is not answerable for his default. The mortgagee is only bound to give credit for such sums as reach his hands (*a*). The mortgagor might recover from the mortgagee sums paid to the latter under a mistake of fact by the receiver, in excess of the sums actually due up to six years before action (*b*).

Coming now to sub-section (3),—it is enacted that the receiver may recover income by action “in the name of either of the mortgagor or of the mortgagee.” It was accordingly held, in an Irish case decided in the year 1889, that, a mortgagor having died leaving the mortgaged Section 24,
sub-s. (3)
(Act of
1881).

(*x*) See s. 24 (2) of the Act, and the interpretation of the word “mortgagor” in s. 2 (vi.), quoted *supra*, p. 366.

(*y*) *Re Hale, supra*.

(*z*) *Hibernian Bank v. Yourrel*, [1919] 1 Ir. R. 310.

(*a*) *Re Della Rocella's Estate*, 29 L. R. Ir. 464, at p. 468, in which case the receivership deed

directed the receiver to pay creditors pursuant to s. 24, “save that, in priority to all other charges except rent, rates, and taxes, he shall pay any reasonable costs or charges incurred by” the mortgagees.

(*b*) See *Re Jones' Estates*, [1914] 1 Ir. R. 88.

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property to his trustees, of whom one predeceased him and the other disclaimed, the receiver appointed under the Act was entitled, pending the appointment of new trustees, to bring an action against a tenant for rent in the name of the mortgagor's heir-at-law, as being the "mortgagor" (c) for the time being, on giving him a proper indemnity (d).

Distress.

It is further to be borne in mind that, while this third sub-section says that the receiver may distrain in the name either of the mortgagor or of the mortgagee, it does not say that, where a receiver of the rents of mortgaged property has been appointed by the mortgagee, the mortgagor may himself distrain, without any authority from the receiver. As long as the receivership is in force, and the receiver's notice to the tenants of his appointment has not been withdrawn, no valid distress can be levied except by the receiver, or by some person, including the mortgagor, authorised by him (e). In the absence of such authority, the mortgagor may, it is conceived, be restrained by injunction from distraining for rent due from a tenant of part of the mortgaged property, even though the receiver may have been negligent in collecting the rents (f).

If a receiver, appointed by mortgagees under the Act of 1881, distrains under the statutory power after the title of the mortgagees has come to an end, he may be sued by the tenant, and be made personally liable in damages, on the ground of wrongful distress (g).

(c) See note (x), p. 371.

(f) *Bayly v. Went*, 51 L. T.

(d) *Fairholme v. Kennedy*, 24 764; (1884), W. N. 197.

L. R. Ir. 498.

(g) *Serjeant v. Nash, Field &*

(e) *Woolston v. Ross*, [1900] 1 Co., [1903] 2 K. B. 304.

Ch. 788, at p. 791.

In virtue of the direction contained in sub-section 8 (iv.) of the same section (24), a receiver appointed by mortgagees is bound to pay any arrears of interest due to the mortgagees at the date of his appointment, as well as interest accruing due subsequently (*h*). And in a later action (*i*), which arose out of the mortgage transaction which gave rise to the last cited case, it was held by the Irish Court of Appeal that the mortgagor, although he had not been a party to a bond given to the mortgagees by the receiver and his surety, conditioned for the faithful discharge of the receiver's duties, was a person so vitally interested in the discharge of those duties as to be entitled to maintain an action (joining the mortgagees, the obligees of the bond, as co-plaintiffs) against the surety, for the recovery from the latter of a sum of money collected by the receiver, which, on his failure to pay it over as he ought to have done to the mortgagees, they had obtained by selling a portion of the mortgaged property.

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Section 24,
sub-s. (8)
(Act of
1881).

Lastly, it is noticeable that the Act of 1881 confers upon a statutory receiver no power of leasing; and that, although a puisne mortgagee by deed may appoint a receiver, he is liable to be ousted from possession by a receiver subsequently appointed by a prior mortgagee by deed of the same property (*k*).

By section 3 (11) of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), the powers of leasing and accepting surrenders of leases respectively conferred by section 18 of the Conveyancing Act, 1881, and section 3 of the

(*h*) *National Bank v. Kenny*, [1898] 1 Ir. R. 197, an action by mortgagees against receiver for an account, &c.

bility Assurance Corporation, [1901] 1 Ir. R. 301.

(*k*) See Hood & Challis' *Conveyancing*, &c., Acts, 7th ed., p. 102.

(*i*) *Kenny v. Employers' Lia-*

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Conveyancing Act, 1911, are, after a receiver has been appointed of the mortgaged property or any part thereof by a mortgagee under the Act of 1881, and so long as the receiver acts, exercisable by such mortgagee instead of by the mortgagor as respects any land affected by the receivership as if such mortgagee were in possession of the land.

Puisne
mort-
gagees.

A puisne incumbrancer has no right to take possession, nor can he apart from express provision therefore give a good receipt for the rent : his right is limited to appointing a receiver or obtaining the appointment of a receiver by the court. If the receiver appointed by him gives no notice to the tenants to pay him their rents, they can, though aware of the appointment, obtain a valid receipt from the mortgagor or a creditor of his entitled under a garnishee order (l).

Leave of
the court
when
necessary.

During the currency of the Courts (Emergency Powers) Acts mortgagees cannot exercise the power of appointing a receiver without the leave of the court in the case of mortgages made before August 4th, 1914, unless the mortgagees were in possession at that date (m).

COMPANIES.

Appoint-
ment of
receiver
by or for
debenture
holders.

In *Blaker v. Herts and Essex Waterworks Co.*(n), Kay, J., expressed, *obiter*, an opinion to the effect that the power of sale, and presumably also the power of appointing

(l) *Vacuum Oil Co. v. Ellis*,
[1914] 1 K. B. 693.

(m) See Court (Emergency
Powers) Acts, 1914, s. 1 (1) (b),
and 1916 (No. 2), s. 1 (1) (a).

See p. 47 and Annual Practice,
for rules, and practice on obtain-
ing leave.

(n) 41 Ch. D. 399, at pp. 405,
406.

a receiver, conferred on mortgagees by deed by the 19th section of the Conveyancing Act of 1881 did not apply to, so as to be exercisable by, the holders of mortgage debentures of a company formed under the Companies Acts. The decision, however, proceeded on the ground that as the undertaking was of a public nature no power of sale could be implied (o), and in a later case (p) before the Court of Appeal it appears to have been assumed that these *dicta* of Kay, J., cannot be supported. Whether that is so or not, there is no doubt that such debentures, and also what are called debenture trust deeds, validly may, by the use of apt language for the purpose, provide for the appointment by the debenture holders, or by their trustees (as the case may be), of a receiver, or a receiver and manager, of the property charged by the debentures, or comprised in the trust deed, and may incorporate with the debentures or trust deed, either without or with any modification which may be desired, the above-quoted provisions of the Act of 1881 relating to receivers. And that is very commonly done; and, in pursuance of the terms of the instruments authorising such an appointment, receivers are appointed, whose powers and position in each particular case are derived from, and depend upon, the contract between the parties expressed in the authorising instrument (q).

Where, therefore, a trust deed for securing a company's debentures empowers the trustees to appoint a receiver

(o) See *Deyes v. Wood*, [1911] 1 K. B. p. 818.

(p) *Deyes v. Wood*, [1911] 1 K. B. 806.

(q) See *Palmer's Company Precedents*, Part III., 10th ed., pp. 258, 302, 426, 452, where

forms of provisions for the appointment of receivers by debenture holders, and by the trustees of debenture trust deeds, and for the indemnification of receivers appointed by such trustees, are given.

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and manager, who is to be the agent of the company and in the same position as a receiver appointed by a mortgagee under the Conveyancing Act of 1881, a receiver and manager so appointed, and carrying on the company's business in the company's name, is a mere agent of the company, and neither he (*r*), nor the trustees who appointed him (*s*), is or are under any personal liability for debts incurred in carrying on the business. And further if, in consequence of an order for the winding up of the company, such a receiver and manager ceases to be the company's agent, he does not, merely by continuing to act, make the trustees liable as his principals, unless they have authorised him to act as their agent (*t*).

But where the instrument authorising the appointment omits to state that the receiver, when appointed, is to be the agent of the company, then it may be inferred from the terms of the instrument that he is the agent for the debenture holders, as, for instance, where he is given powers largely in excess of those conferred on receivers by the Conveyancing Act, 1881 (*u*). When this is the case, the debenture holders will be themselves personally liable to persons dealing with the receiver, and also to the receiver for his remuneration. Thus, where debentures omitted to state that the receiver was to be the agent of the company, and conferred wide powers upon him, including a power to carry on the business for the debenture holders and to sell it, it was held that the receiver was the agent of the debenture holders, who

(*r*) *Owen & Co. v. Cronk*,
[1895] 1 Q. B. 265.

(*s*) *Gosling v. Gaskell*, [1897]
A. C. 575.

(*t*) *Ib.*

(*u*) *Re Vimbos*, [1900] 1 Ch.
470; *Robinson Printing Co. v.*
Chic, Ltd., [1905] 2 Ch. 123;
Deyes v. Wood, [1911] 1 K. B.
806.

were accordingly personally liable to persons dealing with him, and that charges created by the receiver in priority to the debentures were valid (v). Where debentures specifically incorporated certain of the provisions relating to receivers contained in the Conveyancing Act, 1881, but conferred also large additional powers, including a power to carry on the business and to sell, the Court of Appeal held that there was sufficient contrary intention within section 24 (2) of the Conveyancing Act, 1881, to prevent the receiver being agent for the company, and that he was agent for the debenture holders, and therefore entitled to recover his remuneration from them (x).

If, on the principles stated, the receiver becomes the agent of the company, it appears that his appointment will have no effect on contracts, even contracts of service. If, on the other hand, he becomes agent for the debenture holders the effect of his appointment for this purpose appears to be to determine contracts of service (y), and to enable him to carry out contracts not depending on personal relationship, as the assign, or rather the agent for the assign, of the contracting company. In default of any provision to the contrary he will, like a receiver appointed by the court, be deemed to be carrying out contracts already entered into by the company if he supplies goods in pursuance of them, and the persons to whom he supplies such goods can set off damages for subsequent breach against the price (z).

In the above, as in other respects, the powers of a receiver appointed under an instrument depend upon the terms of such instrument: where the powers were wide

(v) *Robinson Printing Co. v. K. B.* 806.

Chic, Ltd., [1905] 2 Ch. 123.

(y) *Ib.*; and see p. 234.

(x) *Deyes v. Wood*, [1911] 1

(z) See *ante*, p. 295.

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it was held that they extended to enable him to pledge existing assets and debts to accrue due during his receivership, but not debts accruing due after he had ceased to act (a). It appears that although the receiver may be the agent of the debenture holders, so as to render them personally liable to persons dealing with him, he is at the same time for some purposes the agent of the company; for instance, so far as to enable him to make a charge upon the assets effective or to sell the assets (b). If, for example, the receiver consents to a prior mortgagee of leaseholds, including in a sale of chattels over which the debentureholder's security extends, certain fixed plant, it is difficult, if not impossible, for the debenture holders to assert any claim to damages for severance, as the consent of the receiver was in their own interest (c).

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order
s been
ide.

In a case in which the debenture holders of a company were, by the terms of their debentures, entitled, in the event of proceedings being taken to wind up the company, to appoint a receiver as if they were mortgagees within the meaning of the Conveyancing Act, 1881, and to invest him with wide powers of managing the company's business, and disposing of its property, and after an order for winding up the company had been made and a liquidator appointed, the debenture holders exercised their power of appointment, it was held by the Court of Appeal that the court ought not to interfere with the right of the debenture holders to have their own receiver, and leave was given to their receiver, notwithstanding the appointment of a liquidator, to take possession of the

(a) *Robinson Printing Co. v. Chic, Ltd.*, [1905] 2 Ch. 123.

(b) *Ib.*; *Deyes v. Wood*, [1911] 1 K. B. p. 821.

(c) See *Re Rogerstone Brick and Stone Co.*, [1919] 1 Ch. 110;

and see *ante*, p. 269.

company's property charged by the debentures, without prejudice, however, to any question as to the powers of the receiver, other than his power of taking possession of and selling the property (*d*). Chap.
XIV.

But the exercise by a majority of debenture holders of a power in the debentures to appoint a receiver, with large powers of management and sale, does not preclude the court from appointing its own receiver in an action by one of the debenture holders, and the appointment will be made on interlocutory application in a proper case, *e.g.*, on the application of a debenture holder to whom another of the debenture holders, who had voted in, and whose vote was necessary to constitute, the majority, had parted with his beneficial interest before the date of the appointment (*e*).

When a receiver has been appointed by debenture holders, a winding-up order may be made on the petition of creditors, although it cannot be shown that there will be any surplus assets for them, or that they will gain any advantage from the order (*f*); as, for instance, if the receiver is incurring large liabilities (*g*) or the business is being carried on substantially in the interests of the debenture holders only, and though the majority in value of unsecured creditors oppose the petition (*h*).

As a receiver appointed by debenture holders is an agent either for them or the company, his personal liability to persons with whom he contracts depends upon the principles of the law of agency (*i*): he may render himself Liability
of receiver
appointed
by debenture
holders.

(*d*) *Re Henry Pound, Son & Hutchins*, 42 Ch. D. 402. Ch. 345.

(*g*) *Ib.*

(*e*) *Re Slogger Automatic Feeder Co., Ltd.*, [1915] 1 Ch. 478. (*h*) *Re Clandown Colliery Co.*, [1915] 1 Ch. 369.

(*i*) See Smith's Leading Cases,

(*f*) *Re Chic, Ltd.*, [1905] 2 11th ed., p. 390.

Chap.
XIV.

liable by expressly or impliedly pledging his own credit (*k*). If he interferes with the rights of third parties, however innocently, he is personally liable as a trespasser, and the debenture holders are in the same position if he has acted within the scope of his authority. Thus, where a receiver and manager of the undertaking of a company had been appointed by debenture holders, and subsequently the assignment to the company of the whole of its assets was set aside as fraudulent within 13 Eliz. c. 5, in such circumstances that the title of the trustee in bankruptcy of the vendor related back, the receiver and the debenture holders were held liable as trespassers in respect of all such parts of the property in question as had come into the hands of the receiver, and an inquiry was directed as to the amount thereof: they were, however, only liable in respect of the actual property which had belonged to the bankrupt, not in respect of assets into which it had by sale been converted, nor for profits (*l*).

Where a receiver appointed by debenture holders had paid into court, to a separate account in his name, money received under a contract, it was held that he came within the category of agents who have handed money over to their principals, and was not, therefore, liable to judgment for breach of contract (*m*).

Notice of appointment to be given to and accounts filed with registrar.

Notice must be given by the person making the appointment to the registrar of companies of the appointment of a receiver or manager of the property of any company under powers contained in an instrument, within seven days of the appointment: entry is thereupon made on

(*k*) *Robinson Printing Co. v. Chic, Ltd.*, [1905] 2 Ch. 123.

K. B. 606.
(*m*) *Bissell v. Ariel Motors, Ltd.*, 27 Times Rep. 73.

(*l*) *Re Goldberg*, [1912] 1

the register of mortgages (*n*). The receiver and manager so appointed must file with the registrar an abstract of his accounts every half year and on ceasing to act, and also notice of his ceasing to act (*o*). Chap.
XIV.

During the currency of the Courts (Emergency Powers) Acts debenture holders cannot exercise their power of appointing a receiver if their debentures have been created prior to August 4th, 1914, without the leave of the court (*p*). Leave
under
Emer-
gency
Powers
Acts.

(*n*) Companies (Cons.) Act, 1908, s. 94. Acts, 1914, s. 1 (1) (*b*), and 1916 (No. 2), s. 1 (1) (*a*). For form

(*o*) *Ib.*, s. 95. of application, see the rules set

(*p*) Courts (Emergency Powers) out in Annual Practice.

CHAPTER XV.

SEQUESTRATION AND SEQUESTRATORS.

Chap. XV. A WRIT of sequestration is a process of execution against the estate, which is said to have been first issued by Lord Keeper Bacon, and was resorted to by reason of the infirmity of the process of contempt, which is merely personal (a). Proceedings on the writ are *in rem*, not *in personam* (b): the writ is issued only against the property of persons who are in contempt (c), and is the most stringent process of execution against property known to the court.

Nature of writ. The writ in its present form (d) authorises and directs two or more of the sequestrators (who must be four in number) to enter into all the messuages, lands, tenements and real estate of the contemnor and to collect and receive the rents and profits thereof and also all the goods, chattels and personal estate of the contemnor and to detain and keep the same in their hands until the contemnor shall do the act in respect of which he is in contempt, clear his contempt, and the court shall make further order (e). The position of sequestrators differs in several respects from that of receivers, for example, in the greater powers

- (a) *Per Eady, L.J., In re [1894] 1 Q. B. 246.*
Suarez, [1918] 1 Ch. p. 194. (d) See *Pratt v. Inman*, 43
(b) *Ib.*; and see *Tatham v. Ch. D. 175.*
Parker, 1 Sm. & Giff. 506, 514. (e) *R. S. C. App. H, No. 13.*
(c) See *Hulbert v. Cathcart*,

and immunity of the former and in the fact that the writ, Chap. XV. unlike a receivership order, does not specify any particular property, but extends generally to all the property of the person against whom it is issued.

Sequestration issues against the property of a peer or person protected by privilege of Parliament (f) or a married woman (g) or an infant (h), as well as against that of ordinary persons and corporations. Against whom.

The word "sequestration" in a statute is not necessarily confined to process under the writ, but includes the detention of property by a Court of Justice for the purpose of answering a demand which is made (i): thus the arrest of a ship is sequestration within section 211 of the Companies (Consolidation) Act, 1908 (j). Meaning of sequestration.

The Rules of the Supreme Court contain the following specific provisions with regard to the issue of a writ of sequestration. Sequestration may issue (1) without leave or further order against the estate and effects of a person refusing or neglecting to obey according to the exigency thereof an order for payment of money into court, or the doing of an act ordered to be done in a limited time after due service of such order on him (Ord. 43, r. 6); (2) on a judgment for the recovery of property other than land or money (Ord. 42, r. 6); (3) on a judgment for payment of money into court (Ord. 42, r. 4); (4) with the leave of the court against the corporate property or the property of the directors or other officers of a corporation, upon a judgment or order against the corporation wilfully

(f) *Quære* whether it is now necessary to obtain a rule *nisi*: see *Smallbrooke v. Donegal*, 3 Anst. 647. (h) *Anon.*, 2 Cas. in Ch. 163; as to lunatics, *infra*, p. 403.

(g) *Worrall v. Worrall*, 11 Times Rep. 573. (i) *Per* Jessel, M.R., *Re Australian Direct Navigation Co.*, 20 Eq. p. 327.

(j) *Ib.*

Chap. XV. disobeyed (Ord. 42, r. 31) ; and (5) with the leave of the court to enforce payment of costs (Ord. 43, r. 7). It is further provided by Ord. 42, r. 24, that every order may be enforced in the same way as a judgment could have been enforced.

These rules will be dealt with in detail. It will be observed that in cases covered by Ord. 43, r. 6, leave is unnecessary, while in applications under Ord. 42, r. 31, and Ord. 43, r. 7, leave is declared to be necessary. Rules 4 and 6 of Ord. 42 are silent on this point, but it appears that, if the application is made under r. 4, leave should be obtained (*k*), and the same would seem to be the case under r. 6 (*l*).

If the case falls both within Ord. 43, r. 6, and any other rule such as an order for payment into court (*m*), the applicant has an option whether he will proceed without leave under Ord. 43, r. 6, or apply for leave and proceed under Ord. 42, r. 4 : in the former case personal service of the order disobeyed on the contemnor cannot be dispensed with : in the latter it can in a proper case (*n*). And even if the case falls within the terms of Ord. 43, r. 6, and no other rule, *e.g.*, an order to deliver up custody of an infant, application may be made for leave and thus the necessity for personal service avoided (*o*). In all cases, therefore, unless covered by the express terms of

(*k*) *Re Suarez*, [1918] 1 Ch. p. 194.

(*l*) It is believed, however, that the writ has been issued without leave under this rule, probably on the ground that the case was covered by Ord. 43, r. 6 ; an order for *delivery* of property may be enforced under

that rule without leave.

(*m*) Which is dealt with also by Ord. 42, r. 4.

(*n*) *Re Suarez*, [1918] 1 Ch. 179 ; and see *infra*, p. 393, as to service.

(*o*) *R. v. Wigand*, [1913] 2 K. B. 419.

Ord. 43, r. 6, leave must be obtained; and it seems that Chap. XV. in all cases it may be applied for (*p*).

These rules do not constitute an exclusive code dealing with the issue of the writ: for instance, sequestration may be allowed to issue for the breach of an undertaking in accordance with the former practice, though such a case is not specifically covered by the rules (*q*).

It has been asserted (*r*) that leave cannot be given to issue sequestration, except against a corporation or its officials (*s*) for breach of an order to abstain from doing an act; but the case of *Selous v. Croydon Local Board* (*t*), cited in support, does not appear to bear out this proposition. That case *inter alia* decided that where the application for the writ was made against a corporation for breach of a prohibitive order, the leave of the court was properly applied for, as the case did not fall within Ord. 43, r. 6 (*u*). It is submitted that where a person who is guilty of the wilful breach of a prohibitive order evades attachment, *e.g.*, by leaving the country, the court has jurisdiction to give leave for the issue of a writ of sequestration for the following reasons (*x*). The foundation for the jurisdiction to issue sequestration

(*p*) Though possibly, if the case is within the express terms of Ord. 43, r. 6, and there is no reason alleged for asking for leave, the applicant might be ordered to pay costs of the application: see *Selous v. Croydon Local Board*, 53 L. T. 209.

(*q*) *Milburn v. Newton Colliery, Ltd.*, 52 L. J. 317, following *London and Birm. Ry. v. Grand Junction Canal Co.*, 1 Ry. Cas. 224; for a case where leave was refused, see *A.-G. v. Wheatley*,

116 L. T. Jo. 153; and where an injunction was granted in lieu of sequestration, see *Marsden & Sons, Ltd. v. Old Silkstone Collieries, Ltd.*, 13 L. G. R. 642.

(*r*) Seton, p. 443; Yearly Practice, note to Ord. 43, r. 6.

(*s*) Under Ord. 42, r. 31.

(*t*) 53 L. T. 209.

(*u*) See also *Aberdonia Cars, Ltd. v. Brown, Hughes and Strachan*, [1915] W. N. 254.

(*x*) It would be necessary either to prove that attachment

Chap. XV. against a corporation for breach of a prohibitive order was that attachment was impracticable; and for the same reason sequestration formerly issued against peers or persons protected by privilege of Parliament against arrest for disobedience to an order, without first issuing attachment, as was, under the then practice, necessary in ordinary cases (*y*). Against privileged persons sequestration certainly issued for breach of a prohibitive order, as in *Eyre v. Countess of Shaftesbury* (*z*), where the writ issued for procuring marriage of a ward of court in disobedience to the prohibition implied by the existence of the wardship. Under the present practice it appears that the court applies the principles formerly applicable to the issue of the writ, unless prohibited by the present rules; for instance, the writ issues by leave for breach of an undertaking, though this is not within the express terms of any rule (*a*); and a party may obtain the leave of the court for the issue of the writ, and thus avoid the absolute necessity for personal service, instead of proceeding under Ord. 43, r. 6, without leave, even in cases not expressly falling within the terms of any other rule (*b*).

Orders for payment into court Where the order is for payment into court or the doing of any act (*c*) it must state the time, or the time after

had been issued without effect, except possibly where it is proved that the contemnor has fled from the jurisdiction.

(*y*) See *Downshire v. Lady Sandys*, 6 Ves. 107. It appears that whatever may be the case as to other persons, sequestration may still issue with leave against a person privileged from arrest for breach of a prohibitive order: see Seton, p. 443.

(*z*) 2 P. Wms. 110. The contemnor was a dowager peeress, and apparently privileged from arrest: see Oswald on Contempt, 174.

(*a*) *Milburn v. Newton Colliery Co.*, 52 L. J. 317.

(*b*) *R. v. Wigand*, [1913] 2 K. B. 419; *In re Suarez*, [1918] 1 Ch. 194; the case was also within Ord. 42, r. 4.

(*c*) *Secus*, in the case of a

service, of the order within which payment into court is to be made, or any other act done, and there must be endorsed upon the copy of the order which is to be served upon the person required to obey the same, a memorandum in the terms set out in Ord. 41, r. 5 (*d*). If the order omit to fix the time it is not rendered ineffectual, but the court will make a supplemental order fixing the time (*e*). Until a time is fixed the order cannot be enforced (*f*): "forth-with" seems to be a sufficient expression of time within the rule (*g*); though this decision is not in accord with the views expressed in other cases (*h*).

It is proper after the fixed date to insert the words "or subsequently within four days after service," and this is now done by the registrar (*i*). Otherwise, unless the order is served within the time limited, a supplemental order extending the time must be obtained (*k*). The order should be drawn up promptly in order to give the party time to perform the act within the time limited (*l*).

The writ will not issue on the Common Law form of Judgments for

prohibitive order, see *Selous v. Croydon Local Board*, 53 L. T. 209.

(*d*) This is so where the application is under Ord. 42, rr. 4 or 6, though a time limit is not mentioned in those rules.

(*e*) In the Ch. D. usually called a four-day order, though the time is not necessarily four days: see *Needham v. Needham*, 1 Hare, 633.

(*f*) *Gilbert v. Endean*, 9 Ch. D. p. 266; *Re Wilde*, [1910] W. N. 105, 128; *Townend v. Townend*, 93 L. T. 680; but

quære whether the practice in P. D. is governed by Ord. 41, r. 5: see S. C. p. 682; [1909] W. N. 178; *post*, p. 391.

(*g*) *Thomas v. Nokes*, 6 Eq. 521; approved in *Halford v. Hardy*, 81 L. T. 721.

(*h*) See *Gilbert v. Endean*, *supra*.

(*i*) See *Re Tuck*, [1906] 1 Ch. p. 696.

(*k*) *Treherne v. Dale*, 27 Ch. D. 66; *Re Seal*, [1903] 1 Ch. 87.

(*l*) P. M. R. 20: see Annual Practice, Pt. IX.

Chap. XV. judgment for the "recovery" of money (*m*), or for the recovery of land (*n*); nor is there jurisdiction to add to a judgment for the recovery of money an order fixing a time for payment, to enable sequestration to issue (*o*). If, however, the writ is for payment by a person to a person of a sum of money, this amounts to an order to do an act within a limited time and sequestration may issue (*p*). And if no time is fixed a four-day order may be obtained (*q*). It appears that orders for delivery of possession of land to a person (as distinct from a judgment for the recovery of land) may be enforced by sequestration under Ord. 43, r. 6; but a writ of possession under Ord. 47 is the more appropriate remedy (*r*).

As stated, the court may give leave to issue sequestration against the property of a corporation or its officers, if any judgment or order against the corporation is wilfully disobeyed (*s*). This includes prohibitive, as well as positive, orders (*t*). Wilful disobedience does not impute

(*m*) *Hulbert v. Cathcart*, [1894] 1 Q. B. 244; and see *per James, L.J.*, in *Ex parte Nelson*, 14 Ch. D. 41; *Re Oddy*, [1906], 1 Ch. 93.

(*n*) Ord. 42, r. 6; a writ of possession issues: see Ord. 47.

(*o*) *Hulbert v. Cathcart*, *supra*.

(*p*) See *per Lindley, L.J.*, in *Re Lumley*, [1894] 2 Ch. p. 273; *Willcock v. Terrell*, 3 Ex. D. 323; *Slade v. Hulme*, 18 C. D. 653; *Birch v. Birch*, 8 P. D. 163. *Semble*, that sequestration might issue with leave for disobedience to a garnishee order absolute, which is an order for the "payment" of money; but see *Halsbury's Laws of*

England, vol. 14, p. 80 (n.), where the contrary view is expressed.

(*q*) *Per Lindley, L.J.*, in *Re Lumley*, *supra*.

(*r*) *Ante*, p. 237. An order for delivery of chattels may be enforced under Ord. 43, r. 6, and a writ of assistance may be obtained in a proper case: see p. 237.

(*s*) See R. S. C. Ord. 42, r. 31; form of order, *Seton*, 441, 442.

(*t*) Cf. *Selous v. Croydon Local Board*, 53 L. T. 209; *Stancomb v. Trowbridge U. D. C.*, [1910] 2 Ch. 190; *A.-G. v. G. N. Ry. Co.*, 15 Jur. 387.

obstinacy of an obnoxious kind (*u*), but excludes only Chap. XV. casual, or accidental, acts of disobedience (*x*); and means doing or permitting to be done the thing which the corporation was restrained from doing, though there has been no deliberate intention to disobey the injunction, and although the acts were done through the carelessness, negligence, or some other dereliction of duty on the part of the officers or servants of the corporation (*y*).

The writ may be allowed to issue for breach of an undertaking as well as of an order (*z*). It is common practice to allow the writ to lie in the office for a fixed period to give the corporation an opportunity of fulfilling its undertaking or obeying the order (*a*).

It is a matter of discretion whether the writ will be allowed to issue, and the Court of Appeal will not interfere unless that discretion is exercised on a wrong principle or so as to cause injustice (*b*).

If the order disobeyed is a prohibitive one, endorsement under Ord. 41, r. 5, is not required, although a time limit is fixed (*c*): nor, if the party applies under Ord. 42, r. 31, is the order disobeyed required to be personally served

(*u*) *A.-G. v. Walthamstow U. D. C.*, 11 Times Rep. 533. 116 L. T. Jo. 153.

(*x*) See *Fairclough v. Manchester Ship Canal* (1897), W. N. 7. (*a*) See, for instance, *A.-G. v. Walthamstow U. D. C.*, *supra*; *Stancomb v. Trowbridge U. D. C.*, *supra*.

(*y*) *Stancomb v. Trowbridge U. D. C.*, [1910] 2 Ch. 190; *Davis v. Rhayader Granite Quarries*, *infra*. (*b*) *Cocks v. G. W. R.*, 3 Times Rep. 92. As to sequestration for disobeying an order not to infringe a patent, *Spencer v. Ancoats Rubber Co.*, 4 Times Rep. 681.

(*z*) *Milburn v. Newton Colliery, Ltd.*, 52 Sol. Jo. 317; leave was refused in *Davis v. Rhayader Granite Quarries*, 131 L. T. Jo. 79; *A.-G. v. Wheatley & Co.*, (*c*) *Selous v. Croydon Local Board*, 53 L. T. 209.

Chap. XV. on the proper officer (*d*). It would appear from the wording of rules possible that the writ might issue against a corporation, though not its officials, without leave, if the case falls within the terms of Ord. 43, r. 6 (which does not, however, apply to prohibitive orders), if the applicant elects to proceed under that rule. It is, however, stated in all text-books that leave in such a case is necessary and it is certainly wiser to apply for it (*e*).

Seques-
tration for
costs.

As has been pointed out, the leave of the court is necessary to enable sequestration to issue to enforce payment of costs (*f*). The matter is one for the discretion of the judge, which will be interfered with only if exercised on an improper principle or so as to occasion miscarriage of justice. The court must be satisfied that the application is reasonable in the circumstances, but it is unnecessary to specify any particular item of property which can be reached by the writ (*g*).

Sequestration may issue immediately the costs have been taxed and leave obtained. It is not necessary that the order for payment should specify a time limit nor be endorsed as required by Ord. 41, r. 5, nor is personal service necessary where it can be shown that the order is known to the person against whom the order is made and his disobedience is wilful (*h*). An order giving leave to issue sequestration on a future uncertain event, *e.g.*,

(*d*) *Aberdonia Cars, Ltd. v. Brown, Hughes and Strachan, Ltd.*, [1915] W. N. 254; knowledge of the order must be proved: *infra*, p. 393.

(*e*) *Selous v. Croydon Local Board*, *supra*. Probably the officials would refuse to issue the writ without such leave.

(*f*) R. S. C. Ord. 43, r. 7, which supersedes the old practice: *ante*, p. 384.

(*g*) *Hulbert v. Cathcart*, [1896] A. C. 470.

(*h*) *Re Deakin*, [1900] 2 Q. B. 481, 482; *Re Lumley*, [1894] 2 Ch. 271; Ord. 43, r. 6, does not apply.

default in payment within a specified time, is wrong in Chap. XV. form (i), but after disobedience leave may be given, and the writ allowed to remain in the office for a specified time (k). Sequestration cannot issue after acceptance of a composition (l). The issue of a *fi. fa.* for the judgment debt, before taxation, would not prevent the issue of sequestration after the costs are taxed.

After enrolment of a decree of the Court of Arches sequestration may issue by leave for non-payment of costs directed to be paid thereunder (m).

The practice in the Probate Divorce and Admiralty Divorce. Division in matrimonial cases is not governed by the Supreme Court Rules (n) but by the Divorce Rules of 1867, though the court follows the Supreme Court Rules in cases not provided for by its own rules (o). Section 52 of the Matrimonial Causes Act, 1857, empowered the court constituted by that Act (p) to enforce its decrees in the same way that orders might be enforced in the Court of Chancery. That section has been repealed by the Statute Law Revision Act, 1892, but such repeal does not affect the Divorce Court Rules which have statutory effect (q). Rule 110 provides that application for writs of sequestration must be made to the judge by motion in court. By rule 203 sequestration (as well as *fi. fa.* or *elegit*) issues as of course from the registry to enforce orders for non-payment of money on production of an affidavit of service

(i) *Supra*, p. 387.

(k) *Roe v Davies* (1878), W. N. 147.

(l) Ord. 42, r. 18.

(m) See Seton, p. 441, for form of order.

(n) See R. S. C. Ord. 68, r. 1.

(o) *Giles v. Giles*, [1900] P. 17;

Brydges v. Brydges, [1909] P. 187.

(p) The jurisdiction of which is, by the J. A., 1873, ss. 16, 34, transferred to the High Court and exercised by the P. D. and A. Division.

(q) *Ivimey v. Ivimey*, [1908] 2 K. B. p. 264.

Chap. XV. of the order disobeyed and non-payment. Rule 179 provides that an order for payment of costs shall be served on the proctor, attorney or solicitor of the party liable (or, if it is desired to enforce the order by attachment, on the party personally), and if the costs be not paid within seven days, a writ of (*fi. fa.* or) sequestration shall be issued as of course in the registry upon an affidavit of service of the order and non-payment. The court follows the practice of the Court of Chancery in matters relating to sequestration.

The effect of these rules appears to be that the writ issues without leave on disobedience to orders for payment of money other than costs if there has been personal service of the order disobeyed, and for payment of costs if there has been service on the solicitor. In all other cases leave is necessary ; leave may be given to issue the writ, without the necessity of proving personal service, where the disobedient party is keeping out of the way to avoid service (*r*). It appears that the practice is not governed by the provisions of Ord. 41, r. 5, of the Supreme Court Rules (*s*), and that the endorsement thereby required is not indispensable (*t*).

Sequestration is freely issued to enforce orders for payment of costs or alimony or to punish disobedience to the court's orders generally (*u*). It appears that it is the practice in Divorce in some cases to appoint a receiver to administer property sequestered (*x*). Probably this is

(*r*) See *Allen v. Allen*, 10 [1905] W. N. 178 ; *Re Tuck*, P. D. 187 ; *Hyde v. Hyde*, 13 [1906] 1 Ch. p. 694.

P. D. 166 ; *Re Tuck*, [1906] (*u*) See cases cited in note (*r*).
1 Ch. 692. (*x*) See *Dixon on Divorce*,

(*s*) *Supra*, p. 387. p. 288 ; as to practice on appointment, *ante*, p. 182.

(*t*) See *Townend v. Townend*,

done to facilitate the making of periodical payments for Chap. XV.
alimony or maintenance.

As a general rule no order will be made for sequestration unless it can be shown that there has been personal service of the order disobeyed (*y*) ; and if the party applying for the writ is proceeding under Ord. 43, r. 6, and issues it without leave, proof of personal service cannot be dispensed with (*z*). But in cases where the writ issues with leave, if it can be shown that the contemnor is cognisant of the order and evading service, personal service may be dispensed with (*a*). Personal service on the proper official may be dispensed with in a proper case, if the application is against a corporation under Ord. 42, r. 31 (*b*). Service of order disobeyed.

Where leave to issue the writ is required, the application should normally be made by Summons in Chambers, or if the action has been transferred for hearing to a judge who does not sit in chambers, then it may be made in court (*c*) ; in a proper case the costs of a motion will be allowed (*d*). The application should be supported by an affidavit, proving service of the order disobeyed or reasons rendering service impossible, and the default or disobedience relied on (*e*). If the writ is required in respect of non-payment of costs, the certificate of the Mode of application for leave to issue.

(*y*) *Hyde v. Hyūe*, 13 P. D. 166 ; (*c*) *Snow v. Bolton*, 17 Ch. D. 433.
Re Tuck, [1906] 1 Ch. p. 695 ;

Re Suarez, [1918] 1 Ch. 179. (*d*) *Selous v. Croydon Local Board*, 53 L. T. 209.

(*z*) *Re Suarez*, [1918] 1 Ch. p. 197. (*e*) The particular breach complained of should be specified in the summons where the order directs different acts: *Hipkiss v. Fellows*, 101 L. T. 702. Ord.

(*a*) *Re Wigand*, [1913] 2 K. B. 419, cited with approval, *Re Suarez*, *supra* ; and see *ante*, p. 386.

(*b*) *Aberdonia Cars, Ltd. v. Brown, Hughes and Strachan, Ltd.*, [1915] W. N. 254. 52, r. 4, does not apply to necessitate service of copies of this affidavit.

Chap. XV. taxing master, or if the order to be enforced is for payment into court, certificate that money is not in court, dated after the last day for payment in, is required.

Leave is not required under Ord. 64, r. 13, although no proceeding has been taken in the action for twelve months (*f*).

Issue. If leave has been obtained to issue the writ, it issues out of Writ Order and Appearance Department, the Central Office, or out of the District Registry (*g*), on production of the original judgment or order, and the order for issue of the writ, the date of the latter being endorsed on the præcipe (*h*). If leave is not required the order is produced and an affidavit (to be filed), proving personal service of the order disobeyed, endorsed as directed by Ord. 41, r. 5, within the time limited, and, where the order was for payment into court, the pay office certificate.

Irregularity in the issue of the writ may be waived, *e.g.*, by the party against whom it is issued, directing the sequestrators how to deal with the property (*i*), and irregularities in detail may be amended (*k*).

Form of writ.

The form of writ is set out in the appendix to the Supreme Court Rules (*l*). It is addressed to not less than four commissioners, who need not be professional persons; no security is required (*m*). In the case of a married woman it is not limited to her separate estate (*n*).

(*f*) *Taylor v. Roe*, 68 L. T. 213.

(*g*) In divorce, out of the Registry.

(*h*) Central Office Forms, E. and F. 10; Dan. C. F., 6th ed., 449. Stamp on præcipe which is filed, 5 shillings.

(*i*) *Const v. Barr*, 2 Russ. 161.

(*k*) R. S. C. Ord. 28, r. 12; Ord. 70, r. 1.

(*l*) R. S. C. App. H, No. 13; Dan. C. F., 6th ed., 450.

(*m*) Anderson on Execution, 515.

(*n*) *Hyde v. Hyde*, 13 P. D. p. 177; see *Worrall v. Worrall*, 11 Times Rep. 573.

The writ must be registered pursuant to section 5 of Chap. XV. the Land Charges and Registration Act, 1888, and section 2 of the Land Charges Act, 1900, so far as it affects interests in land (o). If the writ is not put in force within a year, it may be renewed on *ex parte* application by summons supported by an affidavit (p). Registration.
Renewal.

Under the former practice sequestration usually issued either after the contemnor had been taken into custody under a writ of attachment or on a return of *non est inventus*, except in the case of a corporation or a person protected by privilege from arrest, when it issued at once. As a result of section 8 of the Debtors' Act, 1869, it is no longer necessary to issue attachment before the writ of sequestration will issue: the writ may also issue concurrently with (q) or after a writ of attachment has been issued and whether the contemnor has been arrested or not (r). But if attachment has already issued leave to issue sequestration must in all cases be obtained (s). Sequestration and attachment.

Where an order of the Chancery Division has been exemplified pursuant to 41 Geo. 3, c. 90, s. 5, and the exemplification enrolled in the Chancery Division in Ireland, such order can only be enforced by attachment or committal as prescribed by that section; and though that remedy is unavailable against a peer there is no

(o) See *infra*, p. 401, as to effect of registration.

(p) R. S. C. Ord. 42, r. 20. It may be simpler to issue a fresh writ unless it is thought possible to bind property disposed of with notice or to volunteers: see p. 397.

(q) As was formerly done in a proper case: *Perryman v. Din-*

ham, 1 Rep. Ch. 52; *Crone v. O'Dell*, 2 Mol. 344.

(r) See *R. v. Wigand*, [1913] 2 K. B. 419.

(s) The order is made on *ex parte* motion on a return of *non est inventus* or production of the certificate of the Governor of the prison that the contemnor is in custody.

Chap. XV. jurisdiction to issue sequestration against his property to enforce the order (t).

Effect of writ and powers of sequestrators. Land.

The sequestrators become entitled to the rents and profits of land from the date of the issue of the writ but not as against purchasers for value until after registration (u). A collusive conveyance to avoid the consequences of sequestration is void against sequestrators even if made before writ (x); and so are voluntary conveyances after writ (y).

Sequestrators are authorised by the writ to enter into possession of lands in the possession of the contemnor and to receive the rents and profits of such of his estate as is in the possession of tenants, who should be served with notice in writing to attorn and pay their arrears and growing rents to the sequestrators (z). If they refuse to attorn the sequestrators may upon summons obtain an order for them to attorn (a); until they attorn the rent cannot be recovered by action (b): the tenants may be allowed their costs of the summons (c). The order to attorn must fix a time pursuant to R. S. C. Ord. 41, r. 5, and may then be enforced by attachment or sequestration. Tenants may, it seems, obtain a good receipt for their rent from the contemnor, until an order is obtained for

(t) *Kilworth v. Mountcashell*, Vern. 58.

31 L. R. Ir. 81.

(z) Form Dan. C. F. 452.

(u) S. 5, Land Charges and Registration Act, 1888; s. 2, Land Charges Act, 1900; see *Ashburton v. Nocton*, [1915] 1 Ch. 119.

(a) *Rowley v. Ridley*, 3 Swa. 306; cited 4 Ves. 738-740; Seton, 448; a motion is as a rule unnecessary, but may be employed instead of a summons.

(x) *Witham v. Bland*, 3 Swa. 276; *Bird v. Littlehales*, 3 Swa. 301; *Blenkinsopp v. Blenkinsopp*, 12 Bea. 568.

(b) *Rowley v. Ridley*, *supra*.

(c) *Milner v. Huddleston*, 22 Ch. D. 233.

(y) See *Burdett v. Rockley*, 1

payment to the sequestrator (*d*). A widow's right to Chap. XV.
 dower (*e*) or jointure (*f*) is not affected by sequestration
 against her husband.

If the sequestrators cannot obtain possession where there are no tenants in occupation, they should apply for a writ of possession, though they may themselves use all means short of an actual breach of the peace to force an entry (*g*).

Sequestration does not prevent distress by the landlord Distress
 in case of leaseholds (*h*), and the court may order the claim for rent to be satisfied out of money in court where the landlord was able to distrain (*i*).

Personalty in the hands of the contemnor is bound Per-
 from the issue of the writ (*k*), but the title of purchasers sonalty.
 for value without notice is good against sequestrators (*l*) ; so is that of a sheriff (*m*). Generally speaking, all property capable of alienation (*n*) is liable to sequestration with certain limited exceptions : these include property of a railway company, exempt under section 4 of the Railway Companies Act, 1867 (*o*) ; military property of soldiers (*p*) ;

(*d*) See *Johnson v. Chippen-*
dall, 2 Sim. 55, 64 ; *Re Pollard*,
 [1903] 2 Ch. 41.

(*e*) *Burdett v. Rockley*, *supra*.

(*f*) *Procter v. Reynol*, 1 Rep.
 Ch. 247.

(*g*) *Lowten v. Colchester*, 2
 Mer. 395.

(*h*) *Dixon v. Smith*, 1 Swa.
 457 ; *Desbrough v. Crumbey*,
 1 Barn. K. B. 212.

(*i*) *Dixon v. Smith*, *supra*.

(*k*) *Burdett v. Rockley*, 1 Vern.
 58. If necessary, a writ of
 delivery or writ of assistance
 may be obtained : see *ante*, p. 388,

as to these writs.

(*l*) See s. 26 (1) Sale of Goods
 Act, 1893, which gives effect to
 the former law. The purchaser
 must prove *bona fides* : *Mur-*
gatroyd v. Wright, [1907] 1 K. B.
 333.

(*m*) *Payne v. Drewe*, 4 East,
 523.

(*n*) See this subject treated
 fully in Chap. III.

(*o*) Made perpetual, 38 & 39
 Vict. c. 31 ; see further as to
 this section, pp. 68, 308 *et seq*.

(*p*) Army Act, 1881, ss. 144,
 145.

Chap. XV. wearing apparel, bedding, and tools to the value of £5, which, though possibly not within the terms of the Small Debts Act, 1845, would be protected in practice. *Bona ecclesiastica*, which do not include profits of a fellowship (*q*), cannot be reached under the writ (*r*), nor can property of which the contemnor is a trustee (*s*).

All other goods and chattels in the possession of the contemnor can be seized at once, though they must not be moved without order : if keys are denied them, sequestrators may force open boxes and rooms to schedule the goods in them (*t*). Sequestrators are entitled to examine documents in the contemnor's house, or in court, to ascertain the existence of assets. Confidential documents in a proper case may be exempted or examined personally by the judge (*u*). By section 15 of the Contempt of Court Act, 1830 (*x*), sequestrators have the same power to seize books, papers, or other things in the custody or power of a contemnor who has delivered them to other persons, and who has been committed for not delivering them or depositing them in court as if they were the contemnor's own property (*x*).

The separate estate of married women is liable to sequestration (*y*), including income on funds in court (*z*), but not either future or accrued income in respect of which she

- | | |
|---|--|
| <p>(<i>q</i>) <i>Moseley v. Warburton</i>, 1
Ld. Ray. 265.</p> <p>(<i>r</i>) See as to execution against
this class of property, p. 407.</p> <p>(<i>s</i>) This exemption has been
always assumed as a matter of
course.</p> <p>(<i>t</i>) <i>Pelham v. Newcastle</i>, 3
Swa. 290 ; <i>Seton</i>, 442.</p> <p>(<i>u</i>) <i>Re Suarez</i>, 88 L. J. Ch.</p> | <p>10.</p> <p>(<i>x</i>) The section, no doubt, was
to assist sequestration on <i>mesne</i>
process, now obsolete.</p> <p>(<i>y</i>) <i>Miller v. Miller</i>, 2 P. & M.
54.</p> <p>(<i>z</i>) <i>Claydon v. Finch</i>, 15 Eq.
266 ; <i>Hyde v. Hyde</i>, 13 P. D.
166.</p> |
|---|--|

is restrained from anticipation (a), except to enforce an Chap. XV. order for payment of a sum in respect of a liability incurred before marriage where the settlement imposing the restraint was made by herself (b).

The liability of pensions to sequestration depends upon whether they are or are not alienable, as to which see Chapter III. of this work. Where the pension is payable out of the Consolidated Fund, the court has no jurisdiction to order the Lords of the Treasury or the Paymaster to pay it to the sequestrators, but the pensioner may be restrained from receiving it and the contemnor restrained from receiving it. The writ is served on the Lords of the Treasury, but they use their discretion in each case and are not bound by it (c).

Sequestrators are not, it seems, bound by estoppels against the contemnor (d). If money or any chose in action to which the contemnor is entitled is in the hands of a third person, the court cannot, on the application of sequestrators in the action, order payment to them (e), unless such third person admits the possession, and submits to an order of the court; since the effect of the writ is not to vest the property in the sequestrators (f).

(a) *Hyde v. Hyde*, 13 P. D. 166.

(b) *Wood v. Lewis*, [1914] 3 K. B. 73; and see p. 137.

(c) *Willcock v. Terrell*, 3 Ex. D. 332; receipt by the contemnor after such an order might be punished as a contempt: see *Eastern Trust Co. v. M'Kenzie, Mann & Co.*, [1915] A. C. 750.

(d) Halsbury's Laws of England, vol. 14, p. 85.

(e) *Simmons v. Lord Kinnaird*, 4 Vesey, 735; *Crispin v.*

Cumano, 1 P. & M. 622; *Johnson v. Chippendall*, 2 Sim. 55, 65; *Craig v. Hamp*, [1896] P. 171, where the earlier cases are referred to.

(f) See *Wilson v. Metcalfe*, 1 Beav. 263; *Crispin v. Cumano*, *supra*; *Miller v. Huddleston*, 22 C. D. 233; *White v. Wood*, 7 Jur. 1124, where the costs of the third person were allowed; *Re Pollard*, [1902] W. N. 144, no costs allowed.

Chap. XV. Unless the third person so submits, separate proceedings by the sequestrators are necessary. Thus, on application in an administration action in the Chancery Division, a trust fund to which the contemnor was entitled was ordered to be paid to sequestrators appointed by the Probate Division (*g*). The issue of the writ creates no charge against third persons, unless there is collusion: thus, bankers honouring cheques of the contemnor, after express notice of the writ, were held not liable to make good to the sequestrators the amounts so paid (*h*).

Money in court belonging to the contemnor will be paid out to sequestrators (*i*) on application in the action to the credit of which it stands (*k*).

The interest of a person entitled to an annuity till it is taken in execution, determines as from the date of the writ (*l*).

Sale
of per-
sonalty.

Where necessary, an order may be made, at all events where sequestration issues to enforce payment of money (*m*), for the sale of all personal property in the custody of sequestrators upon their application, which should be made by Summons in Chambers (*n*). In a proper case service may be dispensed with (*o*). Orders have been made for sale of rents in kind or the natural

(*g*) *Re Slade*, 18 Ch. D. 653.

(*h*) *Re Pollard*, *supra*, where the bank in the circumstances was not given costs.

(*i*) *Claydon v. Finch*, 15 Eq. 266; *Re Slade*, 18 Ch. D. 653; *Cowper v. Taylor*, 16 Sim. 314.

(*k*) *Conn v. Garland*, 9 Ch. App. 101.

(*l*) *Dixon v. Rowe* (1876), W. N. 266, and p. 223, *ante*.

(*m*) A sale might also be ordered in cases within R. S. C. Ord. 50, r. 2.

(*n*) See *Turner v. Clifford* (1870), W. N. 199. It was formerly sometimes made on motion (see *Wharam v. Broughton*, 1 Ves. 184); on notice (*Mitchell v. Draper*, 9 Ves. 208).

(*o*) See *Re Rush*, 10 Eq. 442.

produce of a farm (*p*), household goods and furniture (*q*), Chap. XV. reversionary interest in a fund in court (*r*).

Entry by sequestrators to enforce an order for payment Sale. into court does not amount to delivery in execution to a creditor within section 4 of the Judgments Act, 1864 (*s*), so as to enable the court to order a sale (*t*). It is submitted that where sequestration has issued to enforce an order for payment of money to a person, the registration of the writ under the Land Charges and Registration Act, 1888 (*u*), by virtue of the Land Charges Act, 1900, renders effective the charge provided by the Judgments Act, 1838 (*x*), in favour of the judgment creditor; and that a sale might be ordered in a separate proceeding to enforce the charge (*y*). Apart from this, it seems that a sale of land cannot be ordered unless, possibly, the property is leasehold (*z*).

Sequestrators have of their own motion no power to Duties of do anything except retain property in their possession (*a*). sequestrators But the court has jurisdiction to empower them to do such acts as are necessary for the preservation of the

(*p*) *Shaw v. Wright*, 3 Ves. 22.

(*q*) *Mitchell v. Draper*, 9 Ves. 208.

(*r*) *Cowper v. Taylor*, 16 Sim. 314.

(*s*) *Johnson v. Burgess*, 15 Eq. 398.

(*t*) Or under Ord. 55, r. 9B.

(*u*) See also s. 4, Land Charges Act, 1888, "judgment"; and see notes to s. 18 of the Judgments Act, 1838; in Carson's Real Property Statutes as to what orders and judgments are within that section.

(*x*) SS. 13 and 18; see *Ashburton v. Nocton*, [1915] 1 Ch. 274.

(*y*) See *ante*, p. 213.

(*z*) See *Johnson v. Burgess*, *supra*; *Shaw v. Wright*, 3 Ves. 22; *Sutton v. Stone*, 1 Dick. 107; but cf. *Ellard v. Warren*, 3 Rep. Ch. 348.

(*a*) It is stated (Dixon on Divorce Practice, p. 288) to be a common practice in the Probate and Divorce Division to appoint a receiver with security under s. 25 of the Judicature Act, to administer property sequestered: see *ante*, pp. 51, 182.

Chap. XV. property, or to render it productive; thus, sequestrators may be given leave to let as there may be occasion (b), to redeem mortgages (c), to fell timber (d), to settle dilapidation claims of a tenant (e).

Sequestrators should not of their own authority apply the proceeds of sequestration in their hands even in discharge of a debt, to enforce which the sequestration has issued; they should pay the proceeds into court upon leave obtained by Summons in Chambers: the court will then make such order as it thinks fit for the disposal of those proceeds in satisfaction of the plaintiff's demand or otherwise (f); the plaintiff acquires no charge until such order is made (g).

The court has jurisdiction to order payment out of a fund paid into court by sequestrators of costs which the contemnor has been ordered to pay to the plaintiff (h).

Bank-
ruptcy of
con-
temnor.

Neither receipt of money by the sequestrators nor payment into court to their general credit of the action operates to make a judgment creditor at whose instance the sequestration issued a secured creditor within the Bankruptcy Act, 1914 (i), and therefore neither the title of the sequestrators nor the creditor is good against the trustee in bankruptcy (k). In order to make the creditor a secured creditor some further order as to the disposition

(b) *Harvey v. Harvey*, 3 Rep. in Ch. 87; *Neale v. Bealing*, 3 Sw. 304.

(c) *Hamblyn v. Ley*, 3 Sw. 301.

(d) *Davis v. Chute*, 1 Vern. 160.

(e) *Burkill v. Burkill*, Seton, 6th ed., 456.

(f) See *Cadell v. Smith*, 3 Swa. 308 (n.); *Dunkley v.*

Scribner, 2 Mad. 443.

(g) See *Re Hoare*, [1892] 3 Ch. p. 99; and *Re Pollard*, [1903] 2 K. B. 41; and p. 213.

(h) *Etherington v. Big Blow Gold Mines* (1897), W. N. 21.

(i) *Re Pollard*, [1903] 2 K. B. 41.

(k) *Ib.*; and see *Re Pearce*, [1919] 1 K. B. 354.

of the fund in favour of the creditor is necessary (l). In Chap. XV. the case of land *quære* whether since section 2 of the Land Charges Act, 1900, a creditor who has issued the writ to enforce an order for payment of money to him cannot set up his title as a secured creditor against the trustee in bankruptcy (m).

Sequestration to enforce an order for payment into court is not determined by the death of the disobedient person, and proceedings may be carried on against his legal personal representatives (n); but the sequestrators cannot retain possession of all the property to which the contemnor was entitled, such as property of which he was tenant for life or in tail (o), or probably copyholds (p). In divorce, however, it seems that the death of the contemnor would operate to discharge the order (q).

Apparently executors might obtain leave to issue the writ under Ord. 42, r. 23, but it is advisable to add them as parties under Ord. 17, r. 4.

If the order disobeyed has been served in the manner directed by Ord. 57, r. 5, and Ord. 9, r. 5, sequestration may issue for non-compliance by a person of unsound

Death
of con-
temnor.

Death of
party
obtaining
the order.

Lunacy
of con-
temnor.

(l) *Re Pollard, supra, per* Romer, L.J., where it was suggested that an order for payment to the general credit of the action in which the order disobeyed was made would be sufficient; see, however, *Re Pearce, supra*.

(m) See p. 212; if the order were for payment into court it seems no charge would be created until a further order were made. As to after-acquired property of a bankrupt, see *ante*, p. 218.

(n) *Hyde v. Greenhill*, 1 Dick. 106; *Hyde v. Foster*, 1 Dick. 132; *Pratt v. Inman*, 43 Ch. D. 175.

(o) *Athol v. Derby*, 1 Cas. in Ch. 220.

(p) *Caermarthen v. Hawson*, 3 Swa. 294, 295; *Hyde v. Petit*, Freeman, 125.

(q) See *Brydges v. Brydges*, [1909] P. 187; *Coleman v. Coleman*, [1920] P. 71; but see *Re Stillwell*, [1916] 1 Ch. 365.

Chap. XV. mind not so found with an order made against him while sane for payment into court (r).

Claims of
third
person.

Obstructing sequestrators in the performance of their duties is a contempt of court (s). If a person claims an interest in property of any description which has been taken possession of or claimed by sequestrators, he may apply to the court to direct an inquiry as to his interest therein; and a similar direction may, it seems, be made on the application of sequestrators (t). The application is usually made by summons (u): the examination of the claimant and inquiry take place in chambers. The application may be made by the guardian of an infant, or leave to proceed as a poor person may be obtained (x).

In many instances, in lieu of an inquiry, proceedings in ejectment (y) or an issue (z) have been directed, or the liability of the property to sequestration may be determined on Originating Summons (a); and where the title of a mortgagee is clear, the court may direct the sequestrators to withdraw without compelling him to be examined (b).

The order for an inquiry was not usually made until

(r) *Robinson v. Galland* (1889), W. N. 108.

(s) *Angel v. Smith*, 9 Ves. 336; *Lord Pelham v. Duke of Newcastle*, 3 Swa. 289 (n.); see *Francklyn v. Calhoun*, 3 Swa. 276.

(t) See *Hamblin v. Ley*, 3 Swa. 301 (n.); *Bird v. Littlehales*, 3 Swa. 300 (n.); *Mitchell v. Draper*, 2 Mad. Ch. 305; *secus*, *Kaye v. Cunningham*, 5 Mad. 406.

(u) Form Dan. C. F. 456; application is sometimes made

by motion: for order see Seton, p. 449.

(x) See under R. S. C. Ord. 16, rr. 22 *et seq.*

(y) See *Brooks v. Greathed*, 1 Jac. & W. 177; *Angel v. Smith*, 9 Ves. p. 346; *A.-G. v. Mayor of Coventry*, 1 P. Wms. 308.

(z) *Empringham v. Short*, 3 Hare, 461.

(a) *Knill v. Dumergue*, [1911] 2 Ch. 199.

(b) *Dixon v. Smith*, 1 Swa. 457.

the return of the sequestration (c), but may be ordered Chap. XV. earlier if a proper case is made out by affidavit (d). The person obtaining the order may be required to make an affidavit of documents (e).

If the claimant makes out his title, the sequestration will be discharged as against him (f); and chattels may be ordered to be specifically restored with an inquiry as to damages (g). Where mortgagees establish their title, rents in the hands of the sequestrators will be ordered to be paid to them (h), the position of sequestrators being different from that of receivers in this respect (i), and money in their hands being regarded as in *custodia legis* (k).

In a case in which the discharge of a sequestration was procured by fraudulent methods and the writ was subsequently renewed, the title of a mortgagee under a security created in the interval by collusion with the contemnor in order to defeat the sequestration, was not allowed to prevail over that of the sequestrators (l).

If the order disobeyed is for delivery of a specific chattel, the sequestrators may, it seems, seize it wherever it is (m).

(c) *Lord Pelham v. Duchess of Newcastle*, 3 Swa. 290 (n.).

(d) *Seton*, p. 451, q.v. for order.

(e) *Alton v. Harrison* (1869), W. N. 81.

(f) Costs may or may not be given according to the circumstances: *A.-G. v. Mayor of Coventry*, 1 P. Wms. 307 (n.); *Wharam v. Boughton*, 1 Ves. Senr. 180; *Cooper v. Thornton*, 1 Dick. 72. As to costs of action, see *infra*, p. 407.

(g) *Copeland v. Mape*, 2 Ba. & B. 67; and *infra*, p. 406.

(h) *Walker v. Bell*, 2 Mad. 21, where the earlier cases are cited; *Re Hoare*, [1892] 3 Ch. pp. 98, 99.

(i) See *Re Hoare*, [1892] 3 Ch. 94; *Preston v. Tunbridge Wells Opera House*, [1903] 2 Ch. 323; *Re Metropolitan Amalgamated Estates*, [1912] 2 Ch. 497; and *supra*, p. 191.

(k) *Re Hoare*, *supra*.

(l) *Ward v. Booth*, 14 Eq. 495; and see p. 400, *ante*.

(m) See Contempt of Court Act, 1830 (11 Geo. 4, and 1 Will. 4, c. 36), s. 15 (16).

Chap. XV. It has been stated (n) that a person issuing a writ of sequestration is liable to third persons in respect of wrongful acts of the sequestrator, such as the seizure of property, to which the contemnor has no title. It is submitted that the authorities do not support this proposition without qualification. A sequestrator is not an agent for the person issuing the writ, for money which the sequestrator receives is not in his hands as agent for that person, to whom he cannot pay it without an order, but is *in custodia legis* (o): the position of a sequestrator would appear to be more analogous to that of a sheriff, who is liable in trover in respect of property wrongfully seized, whereas the judgment creditor is not (p). In one case (q) an inquiry as to damages was ordered where a third person had established his title, and, *semble*, the court has jurisdiction to order such damages to be paid out of money in court or in the hands of the sequestrator which is liable to be paid to the judgment creditor, on the footing of subrogation to an implied right to indemnity in the sequestrator against the person issuing the writ (r). There seems no reason to doubt the primary liability of sequestrators to third persons.

If money is paid to sequestrators under a mistake of fact, the person paying might recover it from them (s);

(n) Halsbury's Laws of England, vol. 14, p. 82.

(o) *Walker v. Bell*, 2 Mad. 21; *Re Hoare*, [1892] 3 Ch. 29.

(p) *Whitmore v. Green*, 13 M. & W. 104; *Notley v. Buck*, 8 B. & C. 160; see *Baylis v. Bishop of London*, [1913] 1 Ch. p. 141, *per* Hamilton, L.J.

(q) *Copeland v. Mape*, 2 Ball & B. 66; but see *Davis v.*

Chute, 1 Vern. 160.

(r) See the case of receivers, *ante*, Chapter VIII.; and *Boehm v. Goodall*, [1911] 1 Ch. 155.

(s) On the analogy of the principles enunciated in *Kleinwort v. Dunlop Rubber Co.*, 97 L. T. 263, 265; *Fitzpatrick v. McGlone*, [1897] 2 Ir. R. 542.

but it appears that if they had paid it into court under Chap. XV an order they would have a good defence (*t*), though the court would order payment out to the person who had paid in error, on the principle that the court will see that money in its own control or that of its officer will be applied in meeting just claims (*u*), even where the mistake is one of law (*x*). If the money had been paid out to the judgment creditor under an order, *quære* whether a person who had originally paid it in mistake has any remedy against the creditor (*y*).

If sequestrators fail in an action brought or defended with leave of the court, the order for costs will be made against them personally, not limited to funds in their hands (*z*). If sequestrators abuse their powers they may be committed for contempt (*a*).

Upon the commissioner's return of *nulla bona* (*b*) to a Beneficed clerk. writ of sequestration, if it appear that the contemnor is a beneficed clerk without lay property, a writ of *sequestrari facias de bonis ecclesiasticis* (*c*) may be issued to the bishop and the benefice sequestered thereunder (*d*).

(*t*) See *Re Williams' Settled Estates*, [1910] 2 Ch. 97.

(*u*) See *Re Abdy*, [1919] 2 K. B. 735; *Re Tyler*, [1907] L.K. B. 865.

(*x*) *Ex parte James*, 9 Ch. App. 609; *Wells v. Wells*, [1914] P. 157.

(*y*) He could not claim against the Paymaster: see *Re Williams' Settled Estates*, [1910] 2 Ch. 481. If he could trace the money, he might perhaps recover: *Sinclair v. Broughan*, [1914] A. C. 398; *Re Hallet's Estate*, 13 Ch. D. 696; see also *Re Jones' Estates*,

[1914] 1 Ir. R. 188.

(*z*) *Wiebalck v. Told*, 29 Times Rep. 741; *semble*, they would have a right to indemnity to the extent of the fund.

(*a*) *Lord Pelham v. Lord Harley*, 3 Swa. 291; *Lowten v. Colchester*, 2 Mer. 395; see *Sykes v. Dyson* (1870), W. N. 81.

(*b*) *Post*, p. 408.

(*c*) Forms of writ, R. S. C. App. H, 4-6; Dan. C. F. 422-426; and Dan. Ch. Pr. 752 as to when writ issues.

(*d*) See R. S. C. Ord. 43, rr. 3,

Chap. XV. Leave must be obtained on motion, but no order is drawn up, the memorandum of the registrar being sufficient (e).

The bishop has power to appoint a curate and assign a stipend (f). The bishop is accountable in equity for moneys received by him from the sequestrator and is therefore liable to make good to third persons money paid to the sequestrator under a mistake of fact, although it has been applied by the bishop under the sequestration (g). A sequestrator has been disallowed expenditure for repairs in excess of the estimate in the surveyor's report (h).

Sequestration of the profits of a benefice may be applied for by a trustee in bankruptcy, and it has priority over other sequestrations issued after commencement of the bankruptcy except sequestrations issued before receiving order by or for a person without notice of an available act of bankruptcy (i). The possibility of a sequestration issuing does not prevent a receiving order being made, though it is not shown that the debtor has lay property (k).

Return of
writ.

If the sequestrators cannot seize any property of the contemnor a return of *nulla bona* (l) must be made, if it is desired to issue a writ of *sequestrari facias de bonis*

5, 6; *Norton v. Prichard*, 3 Sm. and G. 455; *Rabbitts v. Woodward*, 20 L. T. 693.

(e) Dan. C. F., stamp on mem. 3 shillings.

(f) See Sequestration Act, 1871; also Ecclesiastical Dilapidations Act, 1871, ss. 13-20. As to power of incumbent to appoint pending sequestration, *Lawrence v. Edwards*, [1891] 1 Ch. 144; as to effect in avoiding a benefice, Benefices Act,

1896, s. 10.

(g) *Baylis v. Bishop of London*, [1913] 1 Ch. 127.

(h) *Kimber v. Paravicini*, 15 Q. B. D. 222.

(i) Bankruptcy Act, 1914, s. 50 (1). See *Re Meredith*, 11 Ch. D. 731.

(k) *Re Hay*, 110 L. T. 47.

(l) Form, Dan. C. F. 451. If filed (which is not usual), a stamp of 2s. 6d. is required.

ecclesiasticis (m); otherwise under the present practice Chap. XV no return is made (n).

Sequestrators must account to the court for everything Accounts which comes to their hands by virtue of their position, and an order will be made on summons fixing the times for rendering accounts and disposal of balances (o). The sequestrators are entitled to their expenses and all proper allowances for executing their commission; their costs as between solicitor and client are frequently allowed, but in some cases only party and party costs have been given (p). The form and method of passing accounts are similar to those in the case of receivers (q).

If the party against whose property sequestration has Discharge of seques- issued desires to apply to set aside the sequestration on tration. the ground of irregularity or want of jurisdiction he should proceed by motion on notice; irregularity may however be waived by the conduct of the contemnor (r).

When the person whose property has been sequestered has purged his contempt, an order may be obtained on summons (s) for the discharge of the sequestration, directing the sequestrators to withdraw from possession and to pass their final accounts. and, after retaining their costs (t), charges, and expenses, and any payments properly made by them, to pay the balance to the contemnor; the order

(m) Ord. as to S. C. Fees, p. 453.

1884, Sch. No. 29; Ord. as to (g) See Chapter XI.

Stamps, July, 1884, Schedule.

(r) *Const v. Barr*, 2 Russ. 161.

(n) See *Goldsmith v. Goldsmith*, 5 Hare, 123.

(s) The application should be by summons, though a motion

(o) Form of summons, Dan. C. F. 455; cf. order, Seton, p. 447.

was formerly resorted to: form, Dan. C. F. 457.

(p) *Re Shapland* (1874), W. N. 202; *Re Southall*, cited Seton,

(t) As to what costs are allowed, see *supra*, and Seton 453.

Chap. XV. provides also for the discharge of the sequestrators from all liability in respect of their office (u).

It has been held that a sequestration is discharged by the appointment of a receiver in the same action, but the order appointing the receiver ought in terms to provide for the discharge of the sequestration (x).

Vacating
registra-
tion.

Application to vacate the registration of a writ of sequestration after discharge should be made to the judge in chambers *ex parte* (y) : jurisdiction to make the order is conferred by section 19 of the Settled Land Act, 1890 (z).

(u) Dan. Ch. Pr. p. 804 ; diction.
order, Seton, p. 452.

(x) *Shaw v. Wright*, 3 Ves.
22 ; *Reeves v. Cox*, 13 Ir. Eq.
247.

(z) The Land Charges Regis-
tration and Searches Act, 1888,
did not provide for vacation :
Cooke v. Cooke, 15 P. D. 116.

(y) A Master has no juris-

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